

PILLSBURY WINTHROP SHAW PITTMAN LLP  
REYNOLD L. SIEMENS #177956

Email: [reynold.siemens@pillsburylaw.com](mailto:reynold.siemens@pillsburylaw.com)

725 South Figueroa Street, Suite 2800

Los Angeles, CA 90017-5406

Telephone: (213) 488-7100

Facsimile: (213) 629-1033

PILLSBURY WINTHROP SHAW PITTMAN LLP  
BRUCE A. ERICSON #76342

Email: [bruce.ericson@pillsburylaw.com](mailto:bruce.ericson@pillsburylaw.com)

MARLEY DEGNER #251923

Email: [marley.degner@pillsburylaw.com](mailto:marley.degner@pillsburylaw.com)

50 Fremont Street, Post Office Box 7880

San Francisco, CA 94120-7880

Telephone: (415) 983-1000

Facsimile: (415) 983-1200

Attorneys for Defendant ROBERT JOHN BURRELL

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA  
WESTERN DIVISION

NATIONAL CREDIT UNION  
ADMINISTRATION BOARD AS  
LIQUIDATING AGENT FOR WESTERN  
CORPORATE FEDERAL CREDIT UNION,

Plaintiff,

vs.

ROBERT A. SIRAVO, TODD M. LANE,  
ROBERT J. BURRELL, THOMAS E.  
SWEDBERG, TIMOTHY T. SIDLEY,  
ROBERT H. HARVEY, JR., WILLIAM  
CHENEY, GORDON DAMES, JAMES P.  
JORDAN, TIMOTHY KRAMER, ROBIN J.  
LENTZ, JOHN M. MERLO, WARREN  
NAKAMURA, BRIAN OSBERG, DAVID  
RHAMY and SHARON UPDIKE,

Defendants.

No. CV 10-01597 GW (MANx)

**ANSWER AND  
COUNTERCLAIMS OF  
DEFENDANT ROBERT  
JOHN BURRELL; AND  
JURY DEMAND**

1 ROBERT JOHN BURRELL,  
2  
3 Counterclaimant,  
4 vs.  
5 NATIONAL CREDIT UNION  
6 ADMINISTRATION BOARD AS  
7 LIQUIDATING AGENT FOR WESTERN  
CORPORATE FEDERAL CREDIT UNION,  
Counterdefendant.

8  
9 **ANSWER TO COMPLAINT**

10 Defendant **ROBERT JOHN BURRELL** (“Burrell”) hereby responds  
11 to the allegations of the Second Amended Complaint (the “SAC,” Doc. 116)  
12 filed February 22, 2011 (numbered paragraphs of the SAC are referred to as  
13 “Paragraph \_\_\_”) of plaintiff, the National Credit Union Administration Board  
14 as Liquidating Agent for Western Corporate Federal Credit Union (“NCUA”),  
15 as follows:

16 **JURISDICTION AND VENUE<sup>1</sup>**

17 1. Burrell admits that Western Corporate Federal Credit Union  
18 (“WesCorp”) was a credit union with its corporate offices located in San  
19 Dimas, California. Burrell further admits, on information and belief, that the  
20 National Credit Union Administration Board placed WesCorp into  
21 conservatorship on March 19, 2009 and into involuntary liquidation on  
22 October 1, 2010. Burrell lacks knowledge or information sufficient to form a  
23 belief as to the truth of the remaining allegations of Paragraph 1 and on that  
24 basis denies those allegations.

25  
26  
27 <sup>1</sup> The headings in this answer follow (albeit not verbatim) those that appear in  
28 the SAC. The headings here in no sense admit anything but are included for  
the convenience of the reader.

2. Paragraph 2 contains legal conclusions, to which no response is required. To the extent the allegations require a response, they are denied.

3. Paragraph 3 contains legal conclusions, to which no response is required. To the extent the allegations require a response, they are denied.

4. Paragraph 4 contains legal conclusions, to which no response is required. To the extent the allegations require a response, they are denied.

5. Paragraph 5 contains legal conclusions, to which no response is required. To the extent the allegations require a response, they are denied.

### **PARTIES**

6. Burrell admits, on information and belief that the National Credit Union Administration Board has appointed itself the liquidating agent for WesCorp.

7. Burrell admits, on information and belief that defendant Robert A. Siravo (“Siravo”) once served as President and CEO of WesCorp. Burrell lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations of Paragraph 7 and on that basis denies those allegations.

8. Burrell admits, on information and belief, that defendant Todd M. Lane (“Lane”) once served as Chief Financial Officer of WesCorp. Burrell lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations of Paragraph 8 and on that basis denies those allegations.

9. Burrell admits that: between June 30, 1997 and March 20, 2009 he served as Chief Investment Officer of WesCorp; between January 31, 2003 and March 20, 2009, he served as an Executive Vice President of WesCorp; the NCUA terminated his employment at WesCorp on March 20, 2009; and he resides in California.

1           10. Burrell admits that defendant Timothy T. Sidley (“Sidley”) once  
2 served as Vice President for Risk Assessment and Chief Risk Officer in charge  
3 of Investment Credit Services of WesCorp. Burrell lacks knowledge or  
4 information sufficient to form a belief as to the truth of the remaining  
5 allegations of Paragraph 10 and on that basis denies those allegations.

6           11. Burrell admits that defendant Thomas E. Swedberg (“Swedberg”)  
7 once served as Vice President of Human Resources and Vice President of  
8 Strategic Planning and Organizational Development of WesCorp. Burrell  
9 lacks knowledge or information sufficient to form a belief as to the truth of the  
10 remaining allegations of Paragraph 11 and on that basis denies those  
11 allegations.

12           12. Burrell admits that former defendant Robert H. Harvey, Jr.  
13 (“Harvey”) was a director and was the Chairman of the WesCorp board of  
14 directors. Burrell lacks knowledge or information sufficient to form a belief  
15 as to the truth of the remaining allegations of Paragraph 12 and on that basis  
16 denies those allegations.

17           13. Burrell admits that former defendant James P. Jordan (“Jordan”)  
18 was a member of the WesCorp board of directors and was the Vice Chairman  
19 of the WesCorp board. Burrell lacks knowledge or information sufficient to  
20 form a belief as to the truth of the remaining allegations of Paragraph 13 and  
21 on that basis denies those allegations.

22           14. Burrell admits that former defendant Timothy Kramer  
23 (“Kramer”) was a member of the WesCorp board of directors and served as  
24 the Secretary and Treasurer of the WesCorp board. Burrell lacks knowledge  
25 or information sufficient to form a belief as to the truth of the remaining  
26 allegations of Paragraph 14 and on that basis denies those allegations.

1           15.    Burrell admits that former defendant Robin J. Lentz (“Lentz”)  
2   was a member of the WesCorp board of directors. Burrell lacks knowledge or  
3   information sufficient to form a belief as to the truth of the remaining  
4   allegations of Paragraph 15 and on that basis denies those allegations.

5           16.    Burrell admits that former defendant John M. Merlo (“Merlo”)  
6   was a member of the WesCorp board of directors. Burrell lacks knowledge or  
7   information sufficient to form a belief as to the truth of the remaining  
8   allegations of Paragraph 16 and on that basis denies those allegations.

9           17.    Burrell admits that former defendant Gordon Dames (“Dames”)  
10   was a member of the WesCorp board of directors. Burrell lacks knowledge or  
11   information sufficient to form a belief as to the truth of the remaining  
12   allegations of Paragraph 17 and on that basis denies those allegations.

13          18.    Burrell admits that former defendant William Cheney (“Cheney”)  
14   was a member of the WesCorp board of directors. Burrell lacks knowledge or  
15   information sufficient to form a belief as to the truth of the remaining  
16   allegations of Paragraph 18 and on that basis denies those allegations.

17          19.    Burrell admits that former defendant Warren Nakamura  
18   (“Nakamura”) was a member of the WesCorp board of directors. Burrell lacks  
19   knowledge or information sufficient to form a belief as to the truth of the  
20   remaining allegations of Paragraph 19 and on that basis denies those  
21   allegations.

22          20.    Burrell admits that former defendant Brian Osberg (“Osberg”)  
23   was a member of the WesCorp board of directors. Burrell lacks knowledge or  
24   information sufficient to form a belief as to the truth of the remaining  
25   allegations of Paragraph 20 and on that basis denies those allegations.

26          21.    Burrell admits that former defendant David Rhamy (“Rhamy”)  
27   was a member of the WesCorp board of directors. Burrell lacks knowledge or  
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1 information sufficient to form a belief as to the truth of the remaining  
2 allegations of Paragraph 21 and on that basis denies those allegations.

3 22. Burrell admits that former defendant Sharon Updike (“Updike”)  
4 was a member of the WesCorp board of directors. Burrell lacks knowledge or  
5 information sufficient to form a belief as to the truth of the remaining  
6 allegations of Paragraph 22 and on that basis denies those allegations.

7 23. Burrell admits that several of the Director Defendants<sup>2</sup> were  
8 members of WesCorp’s Asset and Liability Committee (“ALCO”), budget  
9 committee, compensation committee or other committees. Burrell lacks  
10 knowledge or information sufficient to form a belief as to the truth of the  
11 remaining allegations of Paragraph 23 and on that basis denies those  
12 allegations.

13 24. Burrell admits that WesCorp had a detailed set of corporate  
14 policies, which speak for themselves. Burrell lacks knowledge or information  
15 sufficient to form a belief as to the remaining allegations of Paragraph 24 and  
16 on that basis denies those allegations.

17 25. Burrell admits that WesCorp had a detailed set of corporate  
18 policies, which speak for themselves and which defined the role of the ALCO.  
19 Burrell lacks knowledge or information sufficient to form a belief as to the  
20 remaining allegations of Paragraph 25 and on that basis denies those  
21 allegations.

22 26. Burrell admits that many WesCorp board members regularly  
23 attended ALCO meetings and that he regularly made presentations at ALCO  
24 meetings. Burrell lacks knowledge or information sufficient to form a belief  
25

26  
27 <sup>2</sup> Burrell uses the term “Director Defendants” as used in the Second Amended  
28 Complaint to refer to former defendants Harvey, Merlo, Dames, Jordan,  
Kramer, Cheney, Lentz, Nakamura, Osberg, Rhamy and Updike.

1 as to the truth of the remaining allegations of Paragraph 26 and on that basis  
2 denies those allegations.

3 27. Burrell admits that WesCorp had a budget committee, which  
4 reviewed and had the power to accept or reject WesCorp's annual budget  
5 before sending the budget to the full board for its consideration. Burrell lacks  
6 knowledge or information sufficient to form a belief as to the truth of the  
7 remaining allegations of Paragraph 27 and on that basis denies them.

8 28. Paragraph 28 contains legal conclusions, to which no response is  
9 required. To the extent the allegations require a response, they are denied.

10 29. Paragraph 29 contains legal conclusions, to which no response is  
11 required. To the extent the allegations require a response, they are denied.

#### 12 SUMMARY OF CLAIMS

13 30. Burrell admits that WesCorp was a non-profit corporate credit  
14 union run for the benefit of its members, who were themselves credit unions,  
15 and that WesCorp provided its members with banking and investment  
16 services. The remaining allegations of Paragraph 30 contain legal  
17 conclusions, to which no response is required. To the extent the allegations  
18 require a response, they are denied.

19 31. Burrell admits that WesCorp was a corporate federal credit union  
20 and provided its members with banking and investment services. Burrell  
21 admits that Siravo once served as President and CEO of WesCorp. Burrell  
22 lacks knowledge or information sufficient to form a belief as to the truth of the  
23 remaining allegations of Paragraph 31, and on that basis denies those  
24 allegations.

25 32. Burrell admits that WesCorp invested its members' funds in  
26 securities, including private label mortgage backed securities ("MBS"), and  
27 that the NCUA and WesCorp's members knew on a timely basis what kinds of  
28



1 investments WesCorp had made. Burrell lacks knowledge or information  
2 sufficient to form a belief as to the remaining allegations of Paragraph 32 and  
3 on that basis denies those allegations.

4 33. Burrell lacks knowledge or information sufficient to form a belief  
5 as to the truth of the allegations of Paragraph 33 and on that basis denies those  
6 allegations.

7 34. Burrell avers that WesCorp primarily used the income from its  
8 investments to increase the return to members on their invested funds and to  
9 decrease the amount WesCorp charged members for the services it rendered to  
10 them. Burrell lacks knowledge or information sufficient to form a belief as to  
11 the truth of the allegations of Paragraph 34 and on that basis denies those  
12 allegations.

13 35. Burrell lacks knowledge or information sufficient to form a belief  
14 as to the truth of allegations of Paragraph 35 and on that basis denies those  
15 allegations.

16 36. Burrell admits that WesCorp invested in private label MBS,  
17 including MBS based on Option ARM loans. Burrell lacks knowledge or  
18 information sufficient to form a belief as to the truth of the remaining  
19 allegations of Paragraph 36 and on that basis denies those allegations.

20 37. Burrell denies the allegations of Paragraph 37.

21 38. Burrell admits that WesCorp invested in private label MBS,  
22 including MBS based on Option ARM loans. Burrell lacks knowledge or  
23 information sufficient to form a belief as to the remaining allegations of  
24 Paragraph 38 and on that basis denies those allegations.

25 39. Burrell admits, on information and belief, that the MBS loans that  
26 WesCorp purchased for investment were rated AAA or at least AA by  
27 Moody's and S&P, or both, and were underwritten by the world's leading  
28



1 investment banks. Burrell lacks knowledge or information sufficient to form a  
2 belief as to the truth of the remaining allegations of Paragraph 39 and on that  
3 basis denies those allegations.

4 40. Burrell lacks knowledge or information to form a belief as to the  
5 truth of the allegations regarding WesCorp's 2009 recorded losses, and on that  
6 basis denies them, except to the extent they reference the contents of  
7 WesCorp's 2009 financial statements, which speak for themselves and which  
8 were largely based on assumptions, forecasts and models imposed on  
9 WesCorp by the NCUA. Burrell refers to WesCorp's 2009 financial  
10 statements for their contents and denies any characterization inconsistent with  
11 their terms. Burrell lacks knowledge or information sufficient to form a belief  
12 as to the truth of the remaining allegations of Paragraph 40 and on that basis  
13 denies those allegations.

14 41. Burrell lacks knowledge or information sufficient to form a belief  
15 as to the truth of the allegations of Paragraph 41, and on that basis denies those  
16 allegations.

17 42. Burrell lacks knowledge or information sufficient to form a belief  
18 as to the truth of the allegations of Paragraph 42 and on that basis denies those  
19 allegations.

20 43. Paragraph 43 contains legal conclusions, to which no response is  
21 required. To the extent they require a response, Burrell denies the allegations  
22 about himself and lacks information or knowledge sufficient to form a belief  
23 as to the truth of the allegations of Paragraph 43 about others and on that basis  
24 denies those allegations.

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**FACTUAL ALLEGATIONS**

**The Federal Credit Union System**

44. Burrell admits, on information and belief, that the federal credit union system is a three-tier system consisting of (1) one wholesale corporate credit union (U.S. Central Federal Credit Union); (2) retail corporate credit unions; and (3) “natural person” credit unions. Burrell further admits, on information and belief, that the wholesale corporate credit union, “U.S. Central,” provides services to the retail corporate credit unions, while the retail corporate credit unions provide services to both federally-chartered and state-chartered natural person credit unions. Burrell lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations of Paragraph 44 and on that basis denies them.

45. Burrell admits, on information and belief, that WesCorp was a retail corporate credit union. Burrell lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations of Paragraph 45 and on that basis denies those allegations.

46. Burrell admits, on information and belief, that corporate credit unions are not-for-profit institutions owned by their members and that in the case of retail corporate credit unions, the members are primarily natural person credit unions.

47. Burrell admits, on information and belief, that retail corporate credit unions provide services and support to their natural person credit union members. Burrell admits, on information and belief, that retail corporate credit unions offer their natural person credit unions banking and investment products and services, and that these products and services may include settlement of transactions such as checks, ATM and credit card transactions and wire transfers. Burrell lacks knowledge or information sufficient to form

1 a belief as to the truth of the remaining allegations of Paragraph 47 and on that  
2 basis denies those allegations.

3 48. Burrell avers that the NCUA and WesCorp's members knew,  
4 approved of and encouraged WesCorp's investment strategy, including  
5 without limitation its attempts to obtain higher returns on members'  
6 investments than could be obtained through investing solely or predominantly  
7 in MBS issued by government agencies such as Fannie Mae and Freddie Mac  
8 ("agency MBS"). Burrell lacks knowledge or information sufficient to form a  
9 belief as to the truth of the allegations regarding alleged statements from  
10 WesCorp's website, and on that basis denies them, except to the extent they  
11 reference the contents of WesCorp's website, which speaks for itself. Burrell  
12 refers to WesCorp's website for its contents and denies any characterization  
13 inconsistent with its terms. Burrell lacks knowledge or information sufficient  
14 to form a belief as to the truth of the remaining allegations of Paragraph 48  
15 and on that basis denies those allegations.

16 49. Burrell lacks knowledge or information sufficient to form a belief  
17 as to the truth of the allegations regarding alleged statements from WesCorp's  
18 bylaws, and on that basis denies them, except to the extent they reference the  
19 contents of WesCorp's bylaws, which speak for themselves. Burrell refers to  
20 WesCorp's bylaws for their contents and denies any characterization  
21 inconsistent with their terms. Burrell lacks knowledge or information  
22 sufficient to form a belief as to the truth of the remaining allegations of  
23 Paragraph 49 and on that basis denies those allegations.

24 50. Burrell admits, on information and belief, that corporate credit  
25 unions invest the assets of their natural person credit union members, when  
26 requested to do so by their members, and provide banking and investment  
27 services to their members. Burrell lacks knowledge or information sufficient  
28

1 to form a belief as to the truth of the allegations of Paragraph 50 and on that  
2 basis denies those allegations.

3 51. Burrell admits, on information and belief, that WesCorp provided  
4 services and liquidity to its credit union members and that many of the  
5 members of WesCorp's board of directors were CEOs of natural person credit  
6 unions that were members of WesCorp. Burrell lacks knowledge or  
7 information sufficient to form a belief as to the truth of the remaining  
8 allegations of Paragraph 51 and on that basis denies them.

9 **The Officer Defendants' Responsibilities and Duties**

10 52. Burrell lacks knowledge or information sufficient to form a belief  
11 as to the truth of the allegations regarding alleged statements from WesCorp's  
12 bylaws and policies, and on that basis denies them, except to the extent they  
13 reference the contents of WesCorp's bylaws and policies, which speak for  
14 themselves. Burrell refers to WesCorp's bylaws and policies for their contents  
15 and denies any characterization inconsistent with their terms. Burrell lacks  
16 knowledge or information sufficient to form a belief as to the truth of the  
17 remaining allegations of Paragraph 52 and on that basis denies those  
18 allegations.

19 53. Burrell admits that Siravo once served as President and CEO of  
20 WesCorp. Burrell lacks knowledge or information sufficient to form a belief  
21 as to the truth of the remaining allegations of Paragraph 53 and on that basis  
22 denies those allegations.

23 54. Paragraph 54 contains legal conclusions, to which no response is  
24 required. To the extent the allegations require a response, they are denied.

25 55. Burrell admits that Lane once served as Chief Financial Officer  
26 of WesCorp. Burrell lacks knowledge or information sufficient to form a  
27  
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1 belief as to the truth of the remaining allegations of Paragraph 55 and on that  
2 basis denies those allegations.

3 56. Burrell admits that he once served as Chief Investment Officer  
4 for WesCorp, supervised its Investment Department and, as such, had  
5 responsibility for day-to-day management of the balance sheet, investment  
6 strategies, liquidity and interest rate risk. Burrell denies that he had  
7 responsibility for credit risk management. Burrell avers that WesCorp's  
8 policies, which speak for themselves, specified his duties. The remaining  
9 allegations of Paragraph 56 are legal conclusions, to which no response is  
10 required. To the extent the allegations require a response, they are denied.

11 57. Burrell denies the allegations of Paragraph 57.

12 58. Burrell lacks knowledge or information sufficient to form a belief  
13 as to the truth of the allegations of Paragraph 58 and on that basis denies those  
14 allegations.

15 59. Burrell admits that WesCorp at some time in the late 1990's  
16 formed an Asset/Liability Staff Committee ("ALSC"), which reviewed  
17 balance sheet management and investment strategy, among other matters,  
18 which was in turn reviewed by the ALCO. Burrell denies the remaining  
19 allegations of Paragraph 59.

20 60. Burrell admits that he was a voting member of the ALSC and  
21 ALCO. Burrell lacks knowledge or information sufficient to form a belief as  
22 to the truth of the allegations in the second sentence of Paragraph 60 and on  
23 that basis denies those allegations. The remaining allegations of Paragraph 60  
24 are legal conclusions, to which no response is required. To the extent the  
25 allegations require a response, they are denied.

**WesCorp's Growth**

61. Burrell avers that in the period before 1997, the NCUA disapproved of WesCorp's management and strategies, and in particular told WesCorp that it incurred excessive interest rate risk. Burrell lacks knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 61 and on that basis denies those allegations.

62. Burrell admits that Siravo once served as President and CEO of WesCorp. Burrell denies that WesCorp adopted aggressive plans or strategies after 2002. Burrell lacks knowledge or information sufficient to form a belief as to the remaining allegations of Paragraph 62 and on that basis denies those allegations.

63. Burrell lacks knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 63 and on that basis denies those allegations.

64. Burrell lacks knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 64 and on that basis denies those allegations.

65. Burrell lacks knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 65 and on that basis denies those allegations.

66. Burrell lacks knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 66 and on that basis denies those allegations.

67. Burrell admits that for a period of time, private label MBS were typically higher-yielding than agency MBS. Burrell further admits that WesCorp invested in MBS, including private label MBS. Burrell lacks knowledge or information sufficient to form a belief as to the truth of the

1 remaining allegations of Paragraph 67 and on that basis denies those  
2 allegations.

3         68. Burrell lacks knowledge or information sufficient to form a belief  
4 as to the truth of the allegations regarding alleged statements from WesCorp's  
5 policies, and on that basis denies them, except to the extent they reference the  
6 contents of WesCorp's policies, which speak for themselves. Burrell refers to  
7 WesCorp's policies for their contents and denies any characterization  
8 inconsistent with their terms. Burrell avers that the NCUA by and large  
9 approved of WesCorp's capital goals and that, to the extent that the NCUA  
10 suggested changes in those goals, WesCorp made the suggested changes.  
11 Burrell lacks knowledge or information sufficient to form a belief as to the  
12 truth of the allegations of Paragraph 68 and on that basis denies those  
13 allegations.

14         69. Burrell avers that WesCorp primarily used the income from  
15 members' investments to benefit members, by offering them a higher return on  
16 their investments, or lower charges for services, or both. Burrell lacks  
17 knowledge or information sufficient to form a belief as to the truth of the  
18 allegations of Paragraph 69 and on that basis denies those allegations.

19         70. Burrell lacks knowledge or information sufficient to form a belief  
20 as to the truth of the allegations of Paragraph 70 and on that basis denies those  
21 allegations.

22                     **WesCorp's Private Label MBS Investments**

23         71. Burrell lacks knowledge or information sufficient to form a belief  
24 as to the truth of the allegations of Paragraph 71 and on that basis denies those  
25 allegations.

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1           72. Burrell lacks knowledge or information sufficient to form a belief  
2 as to the truth of the allegations of Paragraph 72 and on that basis denies those  
3 allegations.

4           73. Burrell admits that WesCorp invested in AAA-rated and AA-  
5 rated private label MBS. Burrell avers that the NCUA gave WesCorp special  
6 permission to invest in much lower rated securities, which authority WesCorp  
7 did not use. Burrell also avers that the NCUA's regulations and WesCorp's  
8 policies speak for themselves. Burrell lacks knowledge or information  
9 sufficient to form a belief as to the truth of the remaining allegations of  
10 Paragraph 73 and on that basis denies those allegations.

11           74. Burrell admits that until mid 2007 WesCorp invested in AAA-  
12 rated private label MBS, including Option ARM MBS. Burrell admits that  
13 WesCorp also invested in Collateralized Debt Obligations ("CDOs"), which  
14 are not MBS but multi-class assets that can include MBS along with other  
15 types of collateral. Burrell lacks knowledge or information sufficient to form  
16 a belief as to the truth of the remaining allegations of Paragraph 74 and on that  
17 basis denies those allegations.

18           75. Burrell admits that WesCorp also invested in CDOs, which are  
19 not MBS but multi-class assets that can include MBS along with other types of  
20 collateral, and denies that all the CDOs in which WesCorp invested were  
21 backed solely by pools of MBS. The remaining allegations of Paragraph 75  
22 are legal conclusions, to which no response is required. To the extent the  
23 allegations require a response, they are denied.

24           76. Burrell admits that WesCorp purchased CDOs. Burrell lacks  
25 knowledge or information sufficient to form a belief as to the truth of the  
26 remaining allegations of Paragraph 76 and on that basis denies those  
27 allegations.

28

1           77. Burrell admits that Option ARM MBS are ownership interests in  
2 pools of Option ARM mortgages. Burrell further admits, on information and  
3 belief, that in some instances the monthly payments due on Option ARM  
4 mortgages could be adjusted, at the mortgagee's option, and sometimes reset  
5 in accordance with the terms of the mortgage. Burrell lacks knowledge or  
6 information sufficient to form a belief as to the remaining allegations of  
7 Paragraph 77 and on that basis denies those allegations.

8           78. Burrell denies that through mid 2007 all reduced documentation  
9 (or "Alt-A") mortgage loans were commonly called "liar loans" and avers that  
10 he and many people regarded some reduced documentation loans as only  
11 slightly riskier than "prime" or "conforming" mortgages, and less risky than  
12 "subprime" mortgages. Burrell lacks knowledge or information sufficient to  
13 form a belief as to the truth of the allegations of Paragraph 78 and on that basis  
14 denies those allegations.

15           79. Burrell denies that through mid 2007 he or many people regarded  
16 all Alt-A loans as inherently risky and avers that he and many people regarded  
17 some reduced documentation loans as only slightly riskier than "prime" or  
18 "conforming" mortgages, and less risky than "subprime" mortgages. Burrell  
19 lacks knowledge or information sufficient to form a belief as to the truth of the  
20 allegations of Paragraph 79 and on that basis denies those allegations.

21           80. Burrell admits that WesCorp invested in Option ARM MBS.  
22 Burrell lacks knowledge or information sufficient to form a belief as to the  
23 truth of the remaining allegations of Paragraph 80 and on that basis denies  
24 those allegations.

25           81. Burrell admits that WesCorp purchased certain MBS from  
26 tranches other than the very highest tranches but denies that he or others  
27 regarded these tranches of loans – which were many levels senior to the much  
28

1 lower tranches that the NCUA gave WesCorp permission to buy – as unduly  
2 risky. Burrell further admits, on information and belief, that tranches below  
3 the very highest tranches generally pay a higher yield than do the very highest  
4 tranches. Burrell lacks knowledge or information sufficient to form a belief as  
5 to the truth of the remaining allegations of Paragraph 81 and on that basis  
6 denies those allegations.

7 82. Burrell admits that WesCorp invested in some AA-rated MBS  
8 through 2006 but not thereafter. Burrell avers that the NCUA gave WesCorp  
9 special permission, through “Expanded Authorities,” to invest in securities  
10 rated many levels below AA but that WesCorp chose not to invest in such  
11 lower rated securities. Burrell lacks knowledge or information sufficient to  
12 form a belief as to the truth of the remaining allegations of Paragraph 82 and  
13 on that basis denies those allegations.

14 83. Burrell lacks knowledge or information sufficient to form a belief  
15 as to the truth of the allegations of Paragraph 83 and on that basis denies those  
16 allegations.

17 84. Burrell denies that WesCorp invested in the tranches most likely  
18 to suffer losses or in anything close to that risky. Burrell avers that the NCUA  
19 gave WesCorp special permission to invest in securities rated many levels  
20 below AAA and indeed below AA but that WesCorp chose not to invest in  
21 such lower rated securities. Burrell lacks knowledge or information sufficient  
22 to form a belief as to the truth of the remaining allegations of Paragraph 84  
23 and on that basis denies those allegations.

**WesCorp's Budgets**

85. Burrell admits that every year WesCorp's management and board of directors went through a months-long process to create a budget for the next year. Burrell admits that his Investment Department provided some of the inputs for that budget process, including detailed assumptions and projections regarding balances, investment income, cost of funds and net interest income. Burrell lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations of Paragraph 85 and on that basis denies those allegations.

86. Paragraph 86 contains legal conclusions, to which no response is required. To the extent the allegations require a response, Burrell denies the allegations about himself and lacks knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 86 about others and on that basis denies those allegations.

87. Paragraph 87 contains legal conclusions, to which no response is required. To the extent the allegations require a response, Burrell lacks knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 87 and on that basis denies those allegations.

88. Burrell lacks knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 88 and on that basis denies those allegations, except to the extent they reference the contents of WesCorp's budgets, which speak for themselves. Burrell refers to WesCorp's budgets for their contents and denies any characterization inconsistent with their terms.

89. Burrell admits that the return WesCorp earned on its investment portfolio affected WesCorp's investment income: this is tautologically true. Burrell denies the remaining allegations of Paragraph 89, including but not

1 limited to any implication that WesCorp took imprudent investment risks for  
2 the sake of achieving the goals set by budgets.

3 90. Burrell denies that the 2007 budget, or any WesCorp budget,  
4 “mandated” or required anything; rather, budgets set goals, which might or  
5 might not be abandoned, achieved or modified as circumstances warranted.  
6 Burrell lacks knowledge or information sufficient to form a belief as to the  
7 truth of the allegations of Paragraph 90 and on that basis denies those  
8 allegations, except to the extent they reference the contents of WesCorp’s  
9 budgets, which speak for themselves. Burrell refers to WesCorp’s budgets for  
10 their contents and denies any characterization inconsistent with their terms.

11 91. Burrell denies the allegations of Paragraph 91, including but not  
12 limited to any implication that he or the Investment Department ever ensured  
13 or guaranteed any particular level of income, or took imprudent investment  
14 risks for the sake of achieving the goals set by budgets.

15 92. Burrell lacks knowledge or information sufficient to form a belief  
16 as to the truth of the allegations of Paragraph 92 and on that basis denies those  
17 allegations.

18 93. Burrell lacks knowledge or information sufficient to form a belief  
19 as to the truth of the allegations of Paragraph 93 and on that basis denies those  
20 allegations.

21 94. Burrell lacks knowledge or information sufficient to form a belief  
22 as to the truth of the allegations of Paragraph 94, and on that basis denies those  
23 allegations, except to the extent they reference the contents of WesCorp’s  
24 budgets, which speak for themselves. Burrell refers to WesCorp’s budgets for  
25 their contents and denies any characterization inconsistent with their terms.

26 95. Burrell denies the allegations of Paragraph 95.  
27  
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1           96. Burrell admits that in 2005 and 2006 he knew that the spreads  
2 between the returns on agency MBS and the returns on private label MBS,  
3 while fluctuating, generally were narrowing and that, at virtually every ALCO  
4 meeting, spreads (among many other things) were discussed. Burrell lacks  
5 knowledge or information sufficient to form a belief as to the truth of the  
6 remaining allegations of Paragraph 96 and on that basis denies those  
7 allegations.

8           97. Burrell lacks knowledge or information sufficient to form a belief  
9 as to the truth of the allegations of Paragraph 97 and on that basis denies those  
10 allegations, except to the extent they reference the contents of WesCorp's  
11 ALCO books, which speak for themselves. Burrell refers to WesCorp's  
12 ALCO books for their contents and denies any characterization inconsistent  
13 with their terms.

14           98. Burrell admits that in 2005 and 2006 he knew that the spreads  
15 between the returns on agency MBS and the returns on private label MBS,  
16 while fluctuating, generally were narrowing. Burrell denies the remaining  
17 allegations of Paragraph 98.

18           99. Burrell avers that in 2005 and 2006 he knew that the spreads  
19 between the returns on agency MBS and the returns on private label MBS,  
20 while fluctuating, generally were narrowing. Burrell lacks knowledge or  
21 information sufficient to form a belief as to the truth of the allegations of  
22 Paragraph 99 and on that basis denies those allegations.

23           100. Paragraph 100 contains legal conclusions, to which no response is  
24 required. To the extent the allegations require a response, Burrell denies those  
25 allegations.

26           101. Paragraph 101 contains legal conclusions, to which no response is  
27 required. To the extent the allegations require a response, Burrell lacks  
28

1 knowledge or information sufficient to form a belief as to the truth of the  
2 allegations of Paragraph 101 and on that basis denies those allegations.

3 102. Paragraph 102 contains legal conclusions, to which no response is  
4 required. To the extent the allegations require a response, Burrell lacks  
5 knowledge or information sufficient to form a belief as to the truth of the  
6 allegations of Paragraph 102 and on that basis denies those allegations.

7 103. Paragraph 103 contains legal conclusions, to which no response is  
8 required. To the extent the allegations require a response, Burrell denies those  
9 allegations.

10 104. Burrell denies the allegations of Paragraph 104.

11 **MBS Concentration**

12 105. Paragraph 105 contains legal conclusions, to which no response is  
13 required. To the extent the allegations require a response, Burrell admits that  
14 the NCUA had regulations, which speak for themselves. Burrell lacks  
15 knowledge or information sufficient to form a belief as to the truth of the  
16 remaining allegations of Paragraph 105 and on that basis denies those  
17 allegations.

18 106. Burrell lacks knowledge or information sufficient to form a belief  
19 as to the truth of the allegations of Paragraph 106 and on that basis denies  
20 those allegations.

21 107. Burrell admits that WesCorp provided services to its members,  
22 including investing their funds if requested to do so. Burrell lacks knowledge  
23 or information sufficient to form a belief as to the truth of the remaining  
24 allegations of Paragraph 107 and on that basis denies those allegations.

25 108. Burrell admits that WesCorp's board had responsibility for  
26 setting investment policies. Burrell admits that WesCorp had many  
27 investment policies, which speak for themselves. Burrell lacks knowledge or  
28



1 information sufficient to form a belief as to the truth of the remaining  
2 allegations of Paragraph 108 and on that basis denies those allegations.

3 109. Burrell admits that WesCorp's ALCO Committee had  
4 responsibility for overseeing corporate policies, including those related to  
5 investment activities and credit risk management. Burrell admits that  
6 WesCorp had many investment policies, which speak for themselves. Burrell  
7 lacks knowledge or information sufficient to form a belief as to the truth of the  
8 remaining allegations of Paragraph 109 and on that basis denies those  
9 allegations.

10 110. Burrell admits that Sidley headed WesCorp's Risk Assessment  
11 Department. Burrell admits that he headed WesCorp's Investment  
12 Department. Burrell admits that the Investment Department would suggest  
13 certain concentration limits, based largely on the size of WesCorp's balance  
14 sheet, to WesCorp's Investment Credit Services Department, which in turn  
15 would exercise its own independent judgment and then recommend  
16 concentration limits to WesCorp's ALCO and board. Burrell lacks knowledge  
17 or information sufficient to form a belief as to the truth of the remaining  
18 allegations of Paragraph 110 and on that basis denies those allegations.

19 111. Burrell admits that WesCorp's board adopted policies specifying  
20 concentration limits for its investment securities and from time to time  
21 amended the policies to change limits or impose new limits, which policies  
22 and which amendments speak for themselves. Burrell lacks knowledge or  
23 information sufficient to form a belief as to the truth of the remaining  
24 allegations of Paragraph 111 and on that basis denies those allegations.

25 112. Burrell admits that the Investment Department would suggest  
26 certain concentration limits, based largely on WesCorp's balance sheet rather  
27 than on its budget or projected investment yields, to WesCorp's Investment  
28

1 Credit Services Department, which in turn would exercise its own independent  
2 judgment and then recommend concentration limits to WesCorp's ALCO and  
3 board. Burrell lacks knowledge or information sufficient to form a belief as to  
4 the truth of the remaining allegations of Paragraph 112 and on that basis  
5 denies them.

6 113. Paragraph 113 contains legal conclusions, to which no response is  
7 required. To the extent the allegations require a response, Burrell lacks  
8 knowledge or information sufficient to form a belief as to the truth of the  
9 allegations of Paragraph 113 and on that basis denies those allegations.

10 114. Paragraph 114 contains legal conclusions, to which no response is  
11 required. To the extent the allegations require a response, Burrell admits that  
12 WesCorp purchased AAA-rated private label MBS. Burrell lacks knowledge  
13 or information sufficient to form a belief as to the truth of the remaining  
14 allegations of Paragraph 114 and on that basis denies those allegations.

15 **Option ARM MBS**

16 115. Burrell lacks knowledge or information sufficient to form a belief  
17 as to the truth of the allegations of Paragraph 115 and on that basis denies  
18 those allegations, except to the extent they reference the contents of  
19 WesCorp's corporate policies, which speak for themselves. Burrell refers to  
20 WesCorp's corporate policies for their contents and denies any  
21 characterization inconsistent with their terms.

22 116. Burrell admits that WesCorp purchased Option ARM MBS.  
23 Burrell lacks information or knowledge sufficient to form a belief as to the  
24 truth of the remaining allegations of Paragraph 116 and on that basis denies  
25 those allegations.

1           117. Burrell denies that Option ARM MBS was a “new” type of  
2 security within the meaning of WesCorp’s policies. Burrell denies the  
3 remaining allegations of Paragraph 117.

4           118. Burrell denies that Option ARM MBS was a “new” type of  
5 security within the meaning of WesCorp’s policies. Burrell lacks knowledge  
6 or information sufficient to form a belief as to the truth of the remaining  
7 allegations of Paragraph 118 and on that basis denies those allegations.

8           119. Paragraph 119 contains legal conclusions, to which no response is  
9 required. To the extent the allegations require a response, Burrell denies that  
10 Option ARM MBS was a “new” type of security within the meaning of  
11 WesCorp’s policies. Burrell lacks knowledge or information sufficient to  
12 form a belief as to the truth of the allegations of Paragraph 119 and on that  
13 basis denies those allegations.

14           120. Burrell admits that he knew that “reset shock” was one factor (of  
15 perhaps 20) affecting the potential performance of collateral pools of Option  
16 ARM MBS. However, the degree to which that factor impacted the credit  
17 risks associated with the Option ARM MBS securities themselves was also  
18 highly dependent on the specific level and type of credit enhancement or  
19 credit support provided to each individual security. At this time, and in  
20 subsequent periods through the period that WesCorp invested in Option  
21 ARMs, the surveillance reports produced by Investment Credit Services  
22 indicated that Option ARM collateral pools were performing better than  
23 expected. Burrell denies the other allegations of Paragraph 120 pertaining to  
24 him or to what he allegedly knew. Burrell lacks information or knowledge  
25 sufficient to form a belief as to the truth of the allegations of Paragraph 120  
26 pertaining to others and on that basis denies those allegations.

1           121. Burrell lacks information or knowledge sufficient to form a belief  
2 as to the truth of the allegations of Paragraph 121 and on that basis denies  
3 those allegations.

4           122. Burrell lacks information or knowledge sufficient to form a belief  
5 as to the truth of the allegations of Paragraph 122 and on that basis denies  
6 those allegations.

7           123. Burrell lacks knowledge or information sufficient to form a belief  
8 as to the truth of the allegations of Paragraph 123 and on that basis denies  
9 those allegations.

10          124. Burrell denies that he was “required” to recommend, propose or  
11 adopt concentration limits for specific types of collateral such as Option ARM  
12 MBS. Burrell avers that WesCorp had a number of different concentration  
13 limits that applied to Option ARM MBS, as well as other types of investments.  
14 Burrell lacks knowledge or information sufficient to form a belief as to the  
15 truth of the remaining allegations of Paragraph 124 and on that basis denies  
16 those allegations.

17          125. Burrell lacks knowledge or information sufficient to form a belief  
18 as to the truth of the allegations of Paragraph 125 and on that basis denies  
19 those allegations.

20          126. Burrell admits that WesCorp’s board adopted meaningful  
21 concentration limits for its private label MBS investments. Burrell lacks  
22 information or knowledge sufficient to form a belief as to the truth of the  
23 remaining allegations of Paragraph 126 and on that basis denies those  
24 allegations.

25          127. Paragraph 127 contains legal conclusions, to which no response is  
26 required. To the extent the allegations require a response, they are denied.

27  
28

1           128. Burrell denies that he was required to recommend, propose or  
2 adopt concentration limits for AAA-rated private label MBS by tranche  
3 position. Burrell avers that WesCorp had a number of different concentration  
4 limits that applied to AAA-rated private label MBS, as well as other types of  
5 investments. Burrell lacks knowledge or information sufficient to form a  
6 belief as to the truth of the remaining allegations of Paragraph 128 and on that  
7 basis denies those allegations.

8           129. Burrell denies that he was required to recommend, propose or  
9 adopt concentration limits for Option ARM MBS or lower tranche AAA-rated  
10 private label MBS in WesCorp's portfolio. Burrell avers that WesCorp had a  
11 number of different concentration limits that applied to Option ARM MBS, as  
12 well as other types of investments. Burrell lacks information or knowledge  
13 sufficient to form a belief as to the truth of the remaining allegations of  
14 Paragraph 129 and on that basis denies those allegations.

15           130. Burrell avers that WesCorp had a number of different  
16 concentration limits that applied to Option ARM MBS, as well as other types  
17 of investments, and tracked compliance with each. Burrell lacks information  
18 or knowledge sufficient to form a belief as to the truth of the allegations of  
19 Paragraph 130 and on that basis denies those allegations.

20           131. Burrell denies the allegations of Paragraph 131 pertaining to him  
21 and to what he knew. Burrell lacks information or knowledge sufficient to  
22 form a belief as to the truth of the remaining allegations of Paragraph 131 and  
23 on that basis denies those allegations.

24           132. Burrell admits that he served as the officer in charge of the  
25 Investment Department. Burrell admits that at one time Sidley was the officer  
26 in charge of the Investment Credit Services Department and Chief Risk  
27 Officer. Burrell denies that the Investment Department had the responsibility  
28

1 for monitoring and reviewing credit risk (as opposed to liquidity and interest  
2 rate risk). Burrell denies that the credit risk monitoring and reviews he saw  
3 that were performed by other departments within WesCorp were perfunctory  
4 or rote. Burrell lacks knowledge or information sufficient to form a belief as  
5 to the truth of the remaining allegations of Paragraph 132 and on that basis  
6 denies those allegations.

7 133. Paragraph 133 contains legal conclusions, to which no response is  
8 required. To the extent the allegations require a response, Burrell denies that  
9 the Investment Department had the responsibility for monitoring and  
10 reviewing credit risk (as opposed to liquidity and interest rate risk). Burrell  
11 denies that the credit risk monitoring and reviews he saw that were performed  
12 by other departments within WesCorp were other than thorough. Burrell lacks  
13 information or knowledge sufficient to form a belief as to the truth of the  
14 remaining allegations of Paragraph 133 and on that basis denies those  
15 allegations.

### 16 **The Warnings of Risks in WesCorp's Portfolio**

17 134. Burrell lacks information or knowledge sufficient to form a belief  
18 as to the truth of the allegations of Paragraph 134 and on that basis denies  
19 those allegations.

20 135. Burrell admits that the Officer Defendants and the Director  
21 Defendants generally attended the ALCO meetings. Burrell refers to  
22 WesCorp's ALCO books, which speak for themselves, for their contents and  
23 denies any characterization inconsistent with their terms. Burrell lacks  
24 information or knowledge sufficient to form a belief as to the truth of the  
25 remaining allegations of Paragraph 135 and on that basis denies those  
26 allegations.

1           136. Burrell admits that in 2005 and 2006 he knew that the spreads  
2 between the returns on agency MBS and the returns on private label MBS,  
3 while fluctuating, generally were narrowing. Burrell refers to WesCorp's  
4 ALCO books, which speak for themselves, for their contents and denies any  
5 characterization inconsistent with their terms. Burrell denies any implication  
6 that he or the Investment Department recommended, or that WesCorp made,  
7 any investments believed to be other than "good" safe and sound investments.  
8 Burrell denies the remaining allegations of Paragraph 136.

9           137. Burrell refers to WesCorp's ALCO books, which speak for  
10 themselves, for their contents and denies any characterization inconsistent  
11 with their terms. Burrell lacks information or knowledge sufficient to form a  
12 belief as to the truth of the allegations of Paragraph 137 and on that basis  
13 denies those allegations.

14           138. Burrell lacks knowledge or information sufficient to form a belief  
15 as to the truth of the allegations in Paragraph 138 and on that basis denies  
16 those allegations, except to the extent they reference the contents of  
17 WesCorp's ALCO books, which speak for themselves. Burrell refers to  
18 WesCorp's ALCO books for their contents and denies any characterization  
19 inconsistent with their terms.

20           139. Burrell lacks knowledge or information sufficient to form a belief  
21 as to the truth of the allegations in Paragraph 139 and on that basis denies  
22 those allegations, except to the extent they reference the contents of  
23 WesCorp's ALCO books, which speak for themselves. Burrell refers to  
24 WesCorp's ALCO books for their contents and denies any characterization  
25 inconsistent with their terms.



1           140. Burrell lacks information or knowledge sufficient to form a belief  
2 as to the truth of the allegations of Paragraph 140 and on that basis denies  
3 those allegations.

4           141. Burrell lacks knowledge or information sufficient to form a belief  
5 as to the truth of the allegations in Paragraph 141 and on that basis denies  
6 those allegations, except to the extent they reference the contents of  
7 WesCorp's ALCO books, which speak for themselves. Burrell refers to  
8 WesCorp's ALCO books for their contents and denies any characterization  
9 inconsistent with their terms.

10          142. Burrell lacks knowledge or information sufficient to form a belief  
11 as to the truth of the allegations in Paragraph 142 and on that basis denies  
12 those allegations, except to the extent they reference the contents of  
13 WesCorp's ALCO books, which speak for themselves. Burrell refers to  
14 WesCorp's ALCO books for their contents and denies any characterization  
15 inconsistent with their terms.

16          143. Burrell admits that WesCorp reduced its purchases of AA-rated  
17 MBS in 2005 and ceased them altogether by the end of 2006. Burrell avers  
18 that WesCorp took many other steps to monitor market trends and to protect  
19 itself against adverse trends. Burrell lacks information or knowledge  
20 sufficient to form a belief as to the truth of the remaining allegations of  
21 Paragraph 143 and on that basis denies those allegations.

22          144. Burrell denies that he failed to inform WesCorp's board and  
23 ALCO of market trends, including any adverse market trends, and avers that  
24 the ALCO books prove the contrary. Burrell denies that he failed to  
25 recommend changes to investment strategy and avers that he recommended,  
26 and WesCorp made, a number of changes to investment strategy, including  
27 deemphasizing and then dropping altogether investments in AA-rated MBS  
28

1 and in subprime MBS, and deemphasizing or dropping other investments  
2 believed to be at increased risk once the housing market started to deteriorate.  
3 Burrell lacks information or knowledge sufficient to form a belief as to the  
4 truth of the remaining allegations of Paragraph 144 and on that basis denies  
5 those allegations.

6 145. Paragraph 145 contains legal conclusions, to which no response is  
7 required. To the extent the allegations require a response, they are denied.

8 146. Paragraph 146 contains legal conclusions, to which no response is  
9 required. To the extent the allegations require a response, Burrell admits that  
10 WesCorp stopped buying all private label MBS, including AAA-rated MBS,  
11 by the middle of 2007. Burrell lacks information or knowledge sufficient to  
12 form a belief as to the truth of the allegations of Paragraph 146 and on that  
13 basis denies those allegations..

14 147. Paragraph 147 contains legal conclusions, to which no response is  
15 required. To the extent the allegations require a response, they are denied.

16 **The NCUA's Takeover of WesCorp**

17 148. Burrell lacks information or knowledge sufficient to form a belief  
18 as to the truth of the allegations of Paragraph 148 and on that basis denies  
19 those allegations.

20 149. Burrell denies the first sentence of Paragraph 149 and avers that  
21 the NCUA took over WesCorp at a time when WesCorp was not insolvent,  
22 had not collapsed and did not lack sufficient liquidity to remain in operation.  
23 Burrell denies any allegation of Paragraph 149 that he was required to  
24 recommend, propose or adopt concentration limits for Option ARM MBS in  
25 WesCorp's portfolio. Burrell lacks knowledge or information sufficient to  
26 form a belief as to the truth of the remaining allegations of Paragraph 149 and  
27 on that basis denies those allegations.  
28

150. Burrell lacks information or knowledge sufficient to form a belief as to the truth of the allegations of Paragraph 150 and on that basis denies those allegations.

151. Burrell denies that he was required to recommend, propose or adopt concentration limits for Option ARM MBS in WesCorp's portfolio. Burrell lacks information or knowledge sufficient to form a belief as to the truth of the remaining allegations of Paragraph 151 and on that basis denies those allegations.

152. Burrell lacks information or knowledge sufficient to form a belief as to the truth of the allegations of Paragraph 152 and on that basis denies those allegations.

153. Burrell lacks information or knowledge sufficient to form a belief as to the truth of the allegations of Paragraph 153 and on that basis denies those allegations.

## The SERP Payments

154. Burrell admits that WesCorp’s board authorized a supplemental executive retention plan (“SERP”) for a number of senior executives, including himself, and avers that the NCUA deprived him of any and all monies to which he would have been entitled at his expected retirement date under his SERP but for the NCUA’s actions. Burrell lacks information or knowledge sufficient to form a belief as to the truth of the remaining allegations of Paragraph 154 and on that basis denies those allegations.

155. Burrell admits that WesCorp's board authorized a SERP for a number of senior executives, including himself, and avers that the NCUA deprived him of any and all monies to which he would have been entitled under his SERP but for the NCUA's actions. Burrell lacks information or

1 knowledge sufficient to form a belief as to the truth of the allegations of  
2 Paragraph 155 and on that basis denies those allegations.

3 156. Burrell admits, on information and belief, that Siravo became  
4 President and CEO of WesCorp. Burrell lacks information or knowledge  
5 sufficient to form a belief as to the truth of the remaining allegations of  
6 Paragraph 156 and on that basis denies those allegations.

7 157. Burrell lacks information or knowledge sufficient to form a belief  
8 as to the truth of the allegations of Paragraph 157 and on that basis denies  
9 those allegations.

10 158. Burrell lacks information or knowledge sufficient to form a belief  
11 as to the truth of the allegations of Paragraph 158 and on that basis denies  
12 those allegations.

13 159. Burrell lacks information or knowledge sufficient to form a belief  
14 as to the truth of the allegations of Paragraph 159 and on that basis denies  
15 those allegations.

16 160. Burrell lacks information or knowledge sufficient to form a belief  
17 as to the truth of the allegations of Paragraph 160 and on that basis denies  
18 those allegations.

19 161. Burrell lacks information or knowledge sufficient to form a belief  
20 as to the truth of the allegations of Paragraph 161 and on that basis denies  
21 those allegations.

22 162. Burrell lacks information or knowledge sufficient to form a belief  
23 as to the truth of the allegations of Paragraph 162 and on that basis denies  
24 those allegations.

25 163. Burrell lacks information or knowledge sufficient to form a belief  
26 as to the truth of the allegations of Paragraph 163 and on that basis denies  
27 those allegations.

28

1           164. Burrell lacks information or knowledge sufficient to form a belief  
2 as to the truth of the allegations of Paragraph 164 and on that basis denies  
3 those allegations.

4           165. Burrell lacks information or knowledge sufficient to form a belief  
5 as to the truth of the allegations of Paragraph 165 and on that basis denies  
6 those allegations.

7           166. Burrell lacks information or knowledge sufficient to form a belief  
8 as to the truth of the allegations of Paragraph 166 and on that basis denies  
9 those allegations.

10          167. Burrell lacks information or knowledge sufficient to form a belief  
11 as to the truth of the allegations of Paragraph 167 and on that basis denies  
12 those allegations.

13          168. Burrell lacks information or knowledge sufficient to form a belief  
14 as to the truth of the allegations of Paragraph 168 and on that basis denies  
15 those allegations.

16          169. Burrell lacks information or knowledge sufficient to form a belief  
17 as to the truth of the allegations of Paragraph 169 and on that basis denies  
18 those allegations.

19          170. Burrell lacks information or knowledge sufficient to form a belief  
20 as to the truth of the allegations of Paragraph 170 and on that basis denies  
21 those allegations.

22          171. Burrell lacks information or knowledge sufficient to form a belief  
23 as to the truth of the allegations of Paragraph 171 and on that basis denies  
24 those allegations.

25          172. Burrell lacks information or knowledge sufficient to form a belief  
26 as to the truth of the allegations of Paragraph 172 and on that basis denies  
27 those allegations.

28

1           173. Burrell lacks information or knowledge sufficient to form a belief  
2 as to the truth of the allegations of Paragraph 173 and on that basis denies  
3 those allegations.

4           174. Burrell lacks information or knowledge sufficient to form a belief  
5 as to the truth of the allegations of Paragraph 174 and on that basis denies  
6 those allegations.

7           175. Burrell lacks information or knowledge sufficient to form a belief  
8 as to the truth of the allegations of Paragraph 175 and on that basis denies  
9 those allegations.

10          176. Burrell lacks information or knowledge sufficient to form a belief  
11 as to the truth of the allegations of Paragraph 176 and on that basis denies  
12 those allegations.

13          177. Burrell lacks information or knowledge sufficient to form a belief  
14 as to the truth of the allegations of Paragraph 177 and on that basis denies  
15 those allegations.

16          178. Burrell lacks information or knowledge sufficient to form a belief  
17 as to the truth of the allegations of Paragraph 178 and on that basis denies  
18 those allegations.

19          179. Burrell lacks information or knowledge sufficient to form a belief  
20 as to the truth of the allegations of Paragraph 179 and on that basis denies  
21 those allegations.

22          180. Burrell lacks information or knowledge sufficient to form a belief  
23 as to the truth of the allegations of Paragraph 180 and on that basis denies  
24 those allegations.

25          181. Burrell lacks information or knowledge sufficient to form a belief  
26 as to the truth of the allegations of Paragraph 181 and on that basis denies  
27 those allegations.

28

1 182. Burrell lacks information or knowledge sufficient to form a belief  
2 as to the truth of the allegations of Paragraph 182 and on that basis denies  
3 those allegations.

4 **FIRST CLAIM FOR RELIEF**

5 **(Breach of Fiduciary Duties – Against the Officer Defendants)**

6 183. Burrell incorporates by reference his responses to paragraphs 1  
7 through 182 as though set forth in full.

8 184. Paragraph 184 contains legal conclusions, to which no response is  
9 required. To the extent the allegations require a response, they are denied.

10 185. Paragraph 185 contains legal conclusions, to which no response is  
11 required. To the extent the allegations require a response, they are denied.

12 186. Paragraph 186 contains legal conclusions, to which no response is  
13 required. To the extent the allegations require a response, they are denied.

14 187. Paragraph 187 contains legal conclusions, to which no response is  
15 required. To the extent the allegations require a response, Burrell lacks  
16 information or knowledge sufficient to form a belief as to the truth of the  
17 allegations of Paragraph 187 and on that basis denies those allegations.

18 188. Paragraph 188 contains legal conclusions, to which no response is  
19 required. To the extent the allegations require a response, Burrell lacks  
20 information or knowledge sufficient to form a belief as to the truth of the  
21 allegations of Paragraph 188 and on that basis denies those allegations.

22 189. Paragraph 189 contains legal conclusions, to which no response is  
23 required. To the extent the allegations require a response, Burrell lacks  
24 information or knowledge sufficient to form a belief as to the truth of the  
25 allegations of Paragraph 189 and on that basis denies those allegations.

1           190. Paragraph 190 contains legal conclusions, to which no response is  
2 required. To the extent the allegations require a response, Burrell denies those  
3 allegations.

4           191. Paragraph 191 contains legal conclusions, to which no response is  
5 required. To the extent the allegations require a response, Burrell denies the  
6 allegations about himself and lacks information or knowledge sufficient to  
7 form a belief as to the truth of the allegations of Paragraph 191 about others  
8 and on that basis denies those allegations.

9           192. Paragraph 192 contains legal conclusions, to which no response is  
10 required. To the extent the allegations require a response, Burrell denies the  
11 allegations about himself and lacks information or knowledge sufficient to  
12 form a belief as to the truth of the allegations of Paragraph 192 about others  
13 and on that basis denies those allegations.

14           193. Paragraph 193 contains legal conclusions, to which no response is  
15 required. To the extent the allegations require a response, Burrell denies the  
16 allegations about himself and lacks information or knowledge sufficient to  
17 form a belief as to the truth of the allegations of Paragraph 193 about others  
18 and on that basis denies those allegations.

19           194. Paragraph 194 contains legal conclusions, to which no response is  
20 required. To the extent they require a response, Burrell lacks information or  
21 knowledge sufficient to form a belief as to the truth of the allegations of  
22 Paragraph 194 and on that basis denies those allegations.

23           195. Paragraph 195 contains legal conclusions, to which no response is  
24 required. To the extent they require a response, Burrell lacks information or  
25 knowledge sufficient to form a belief as to the truth of the allegations of  
26 Paragraph 195 and on that basis denies those allegations.



1           196. Paragraph 196 contains legal conclusions, to which no response is  
2 required. To the extent the allegations require a response, Burrell denies the  
3 allegations about himself and lacks information or knowledge sufficient to  
4 form a belief as to the truth of the allegations of Paragraph 196 about others  
5 and on that basis denies those allegations.

6           197. Paragraph 197 contains legal conclusions, to which no response is  
7 required. To the extent they require a response, Burrell denies those  
8 allegations.

9           198. Paragraph 197 contains legal conclusions, to which no response is  
10 required. To the extent they require a response, Burrell denies those  
11 allegations.

## 12                                   **SECOND CLAIM FOR RELIEF**

### 13           **(Breach of Fiduciary Duties – Against Defendants Rhamy, Updike,** 14           **Dames, Osberg, Longson and Harvey)**

15           199. Burrell incorporates by reference his responses to paragraphs 1  
16 through 198 as though set forth in full.

17           200. The Court has dismissed this claim and accordingly no response  
18 is required. Burrell is not named as a defendant to this Claim and accordingly  
19 no response is required. To the extent the allegations require a response,  
20 Burrell lacks information or knowledge sufficient to form a belief as to the  
21 truth of the allegations, and on that basis denies them.

22           201. The Court has dismissed this claim and accordingly no response  
23 is required. Burrell is not named as a defendant to this Claim and accordingly  
24 no response is required. To the extent the allegations require a response,  
25 Burrell lacks information or knowledge sufficient to form a belief as to the  
26 truth of the allegations, and on that basis denies them.

1           202. The Court has dismissed this claim and accordingly no response  
2 is required. Burrell is not named as a defendant to this Claim and accordingly  
3 no response is required. To the extent the allegations require a response,  
4 Burrell lacks information or knowledge sufficient to form a belief as to the  
5 truth of the allegations, and on that basis denies them.

6           203. The Court has dismissed this claim and accordingly no response  
7 is required. Burrell is not named as a defendant to this Claim and accordingly  
8 no response is required. To the extent the allegations require a response,  
9 Burrell lacks information or knowledge sufficient to form a belief as to the  
10 truth of the allegations, and on that basis denies them.

11           204. The Court has dismissed this claim and accordingly no response  
12 is required. Burrell is not named as a defendant to this Claim and accordingly  
13 no response is required. To the extent the allegations require a response,  
14 Burrell lacks information or knowledge sufficient to form a belief as to the  
15 truth of the allegations, and on that basis denies them.

16           205. The Court has dismissed this claim and accordingly no response  
17 is required. Burrell is not named as a defendant to this Claim and accordingly  
18 no response is required. To the extent the allegations require a response,  
19 Burrell lacks information or knowledge sufficient to form a belief as to the  
20 truth of the allegations, and on that basis denies them.

21                           **THIRD CLAIM FOR RELIEF**

22           **(Breach of Fiduciary Duties – Against Defendants Jordan, Nakamura,**  
23                           **Cheney, Rhamy, Kramer, Lentz, and Osberg)**

24           206. Burrell incorporates by reference his responses to paragraphs 1  
25 through 205 as though set forth in full.

26           207. The Court has dismissed this claim and accordingly no response  
27 is required. Burrell is not named as a defendant to this Claim and accordingly  
28

1 no response is required. To the extent the allegations require a response,  
2 Burrell lacks information or knowledge sufficient to form a belief as to the  
3 truth of the allegations, and on that basis denies them.

4 208. The Court has dismissed this claim and accordingly no response  
5 is required. Burrell is not named as a defendant to this Claim and accordingly  
6 no response is required. To the extent the allegations require a response,  
7 Burrell lacks information or knowledge sufficient to form a belief as to the  
8 truth of the allegations, and on that basis denies them.

9 209. The Court has dismissed this claim and accordingly no response  
10 is required. Burrell is not named as a defendant to this Claim and accordingly  
11 no response is required. To the extent the allegations require a response,  
12 Burrell lacks information or knowledge sufficient to form a belief as to the  
13 truth of the allegations, and on that basis denies them.

14 210. The Court has dismissed this claim and accordingly no response  
15 is required. Burrell is not named as a defendant to this Claim and accordingly  
16 no response is required. To the extent the allegations require a response,  
17 Burrell lacks information or knowledge sufficient to form a belief as to the  
18 truth of the allegations, and on that basis denies them.

19 211. The Court has dismissed this claim and accordingly no response  
20 is required. Burrell is not named as a defendant to this Claim and accordingly  
21 no response is required. To the extent the allegations require a response,  
22 Burrell lacks information or knowledge sufficient to form a belief as to the  
23 truth of the allegations, and on that basis denies them.

24 212. The Court has dismissed this claim and accordingly no response  
25 is required. Burrell is not named as a defendant to this Claim and accordingly  
26 no response is required. To the extent the allegations require a response,  
27  
28

1 Burrell lacks information or knowledge sufficient to form a belief as to the  
2 truth of the allegations, and on that basis denies them.

3 **FOURTH CLAIM FOR RELIEF**

4 **(Breach of Fiduciary Duties – Against All Director Defendants)**

5 213. Burrell incorporates by reference his responses to paragraphs 1  
6 through 212 as though set forth in full.

7 214. The Court has dismissed this claim and accordingly no response  
8 is required. Burrell is not named as a defendant to this Claim and accordingly  
9 no response is required. To the extent the allegations require a response,  
10 Burrell lacks information or knowledge sufficient to form a belief as to the  
11 truth of the allegations, and on that basis denies them.

12 215. The Court has dismissed this claim and accordingly no response  
13 is required. Burrell is not named as a defendant to this Claim and accordingly  
14 no response is required. To the extent the allegations require a response,  
15 Burrell lacks information or knowledge sufficient to form a belief as to the  
16 truth of the allegations, and on that basis denies them.

17 216. The Court has dismissed this claim and accordingly no response  
18 is required. Burrell is not named as a defendant to this Claim and accordingly  
19 no response is required. To the extent the allegations require a response,  
20 Burrell lacks information or knowledge sufficient to form a belief as to the  
21 truth of the allegations, and on that basis denies them.

22 217. The Court has dismissed this claim and accordingly no response  
23 is required. Burrell is not named as a defendant to this Claim and accordingly  
24 no response is required. To the extent the allegations require a response,  
25 Burrell lacks information or knowledge sufficient to form a belief as to the  
26 truth of the allegations, and on that basis denies them.

1           218. The Court has dismissed this claim and accordingly no response  
2 is required. Burrell is not named as a defendant to this Claim and accordingly  
3 no response is required. To the extent the allegations require a response,  
4 Burrell lacks information or knowledge sufficient to form a belief as to the  
5 truth of the allegations, and on that basis denies them.

6           219. The Court has dismissed this claim and accordingly no response  
7 is required. Burrell is not named as a defendant to this Claim and accordingly  
8 no response is required. To the extent the allegations require a response,  
9 Burrell lacks information or knowledge sufficient to form a belief as to the  
10 truth of the allegations, and on that basis denies them.

11           220. The Court has dismissed this claim and accordingly no response  
12 is required. Burrell is not named as a defendant to this Claim and accordingly  
13 no response is required. To the extent the allegations require a response,  
14 Burrell lacks information or knowledge sufficient to form a belief as to the  
15 truth of the allegations, and on that basis denies them.

16                           **FIFTH CLAIM FOR RELIEF**

17                   **(Breach of Fiduciary Duty – Against Siravo and Swedberg)**

18           221. Burrell incorporates by reference his responses to paragraphs 1  
19 through 220 as though set forth in full.

20           222. Burrell is not named as a defendant to this Claim and accordingly  
21 no response is required. To the extent the allegations require a response,  
22 Burrell lacks information or knowledge sufficient to form a belief as to the  
23 truth of the allegations, and on that basis denies them.

24           223. Burrell is not named as a defendant to this Claim and accordingly  
25 no response is required. To the extent the allegations require a response,  
26 Burrell lacks information or knowledge sufficient to form a belief as to the  
27 truth of the allegations, and on that basis denies them.

28

1           224. Burrell is not named as a defendant to this Claim and accordingly  
2 no response is required. To the extent the allegations require a response,  
3 Burrell lacks information or knowledge sufficient to form a belief as to the  
4 truth of the allegations, and on that basis denies them.

5           225. Burrell is not named as a defendant to this Claim and accordingly  
6 no response is required. To the extent the allegations require a response,  
7 Burrell lacks information or knowledge sufficient to form a belief as to the  
8 truth of the allegations, and on that basis denies them.

9           226. Burrell is not named as a defendant to this Claim and accordingly  
10 no response is required. To the extent the allegations require a response,  
11 Burrell lacks information or knowledge sufficient to form a belief as to the  
12 truth of the allegations, and on that basis denies them.

13                           **SIXTH CLAIM FOR RELIEF**

14                           **(Fraud – Against Siravo and Swedberg)**

15           227. Burrell incorporates by reference his responses to paragraphs 1  
16 through 226 as though set forth in full.

17           228. Burrell is not named as a defendant to this Claim and accordingly  
18 no response is required. To the extent the allegations require a response,  
19 Burrell lacks information or knowledge sufficient to form a belief as to the  
20 truth of the allegations, and on that basis denies them.

21           229. Burrell is not named as a defendant to this Claim and accordingly  
22 no response is required. To the extent the allegations require a response,  
23 Burrell lacks information or knowledge sufficient to form a belief as to the  
24 truth of the allegations, and on that basis denies them.

25           230. Burrell is not named as a defendant to this Claim and accordingly  
26 no response is required. To the extent the allegations require a response,  
27  
28

1 Burrell lacks information or knowledge sufficient to form a belief as to the  
2 truth of the allegations, and on that basis denies them.

3 231. Burrell is not named as a defendant to this Claim and accordingly  
4 no response is required. To the extent the allegations require a response,  
5 Burrell lacks information or knowledge sufficient to form a belief as to the  
6 truth of the allegations, and on that basis denies them.

7 232. Burrell is not named as a defendant to this Claim and accordingly  
8 no response is required. To the extent the allegations require a response,  
9 Burrell lacks information or knowledge sufficient to form a belief as to the  
10 truth of the allegations, and on that basis denies them.

11 233. Burrell is not named as a defendant to this Claim and accordingly  
12 no response is required. To the extent the allegations require a response,  
13 Burrell lacks information or knowledge sufficient to form a belief as to the  
14 truth of the allegations, and on that basis denies them.

15 234. Burrell is not named as a defendant to this Claim and accordingly  
16 no response is required. To the extent the allegations require a response,  
17 Burrell lacks information or knowledge sufficient to form a belief as to the  
18 truth of the allegations, and on that basis denies them.

19 **SEVENTH CLAIM FOR RELIEF**

20 **(Breach of Fiduciary Duty – Against Siravo)**

21 235. Burrell incorporates by reference his responses to paragraphs 1  
22 through 234 as though set forth in full.

23 236. Burrell is not named as a defendant to this Claim and accordingly  
24 no response is required. To the extent the allegations require a response,  
25 Burrell lacks information or knowledge sufficient to form a belief as to the  
26 truth of the allegations, and on that basis denies them.

1           237. Burrell is not named as a defendant to this Claim and accordingly  
2 no response is required. To the extent the allegations require a response,  
3 Burrell lacks information or knowledge sufficient to form a belief as to the  
4 truth of the allegations, and on that basis denies them.

5           238. Burrell is not named as a defendant to this Claim and accordingly  
6 no response is required. To the extent the allegations require a response,  
7 Burrell lacks information or knowledge sufficient to form a belief as to the  
8 truth of the allegations, and on that basis denies them.

9           239. Burrell is not named as a defendant to this Claim and accordingly  
10 no response is required. To the extent the allegations require a response,  
11 Burrell lacks information or knowledge sufficient to form a belief as to the  
12 truth of the allegations, and on that basis denies them.

13                           **EIGHTH CLAIM FOR RELIEF**

14                           **(Unjust Enrichment – Against Lane)**

15           240. Burrell incorporates by reference his responses to paragraphs 1  
16 through 239 as though set forth in full.

17           241. Burrell is not named as a defendant to this Claim and accordingly  
18 no response is required. To the extent the allegations require a response,  
19 Burrell lacks information or knowledge sufficient to form a belief as to the  
20 truth of the allegations, and on that basis denies them.

21           242. Burrell is not named as a defendant to this Claim and accordingly  
22 no response is required. To the extent the allegations require a response,  
23 Burrell lacks information or knowledge sufficient to form a belief as to the  
24 truth of the allegations, and on that basis denies them.

25           243. Burrell is not named as a defendant to this Claim and accordingly  
26 no response is required. To the extent the allegations require a response,  
27  
28



1 Burrell lacks information or knowledge sufficient to form a belief as to the  
2 truth of the allegations, and on that basis denies them.

3 244. Burrell is not named as a defendant to this Claim and accordingly  
4 no response is required. To the extent the allegations require a response,  
5 Burrell lacks information or knowledge sufficient to form a belief as to the  
6 truth of the allegations, and on that basis denies them.

7 245. Other than as expressly and specifically admitted above in the  
8 responses to Paragraphs 1 through 244, Burrell denies each and every  
9 allegation of the Second Amended Complaint and denies that it states any  
10 claim against Burrell.

#### 11 **AFFIRMATIVE DEFENSES**

12 246. As and for his affirmative defenses, Burrell alleges as follows and  
13 reserves the right to assert additional defenses in the event that discovery  
14 indicates they would be appropriate.

#### 15 **FIRST AFFIRMATIVE DEFENSE**

##### 16 **(Consent, Approval, Acquiescence, Participation, Ratification)**

17 247. The Second Amended Complaint, and each cause of action  
18 alleged therein against Burrell, is barred, in whole or in part, because of  
19 NCUA's own consent to, approval of, acquiescence in, participation in and/or  
20 ratification of each and every activity that NCUA now challenges as improper.

21 248. In addition, the claims against Burrell are barred because the acts  
22 stated were ratified or approved by other state and federal agencies or entities.

#### 23 **The NCUA's Disapproval of Prior Management and Praise For the** 24 **Management the NCUA Now Is Suing**

25 249. Burrell is informed and believes and on that basis alleges that the  
26 NCUA was critical of WesCorp's prior and so-called conservative  
27 management, disapproved of that management, suggested or required that  
28

1 WesCorp's board hire new management and approved of – or at least did not  
2 disapprove, as it had the power to do – the hiring of WesCorp's new  
3 management, including Burrell.

4 250. In 2005, 2006 and 2007 – and indeed after WesCorp had made all  
5 the investments challenged in this case – the NCUA still praised WesCorp's  
6 management as performing in an exemplary fashion, as demonstrably strong,  
7 as able to balance the various kinds of risk, including credit risk, that WesCorp  
8 faced, as conservative, as operating well within regulatory limits and as  
9 adhering to a much more conservative set of guidelines than the NCUA  
10 required.

11 251. The NCUA gave management such praise despite the NCUA's  
12 knowledge and recognition that WesCorp sought to maximize member returns  
13 while controlling strains on capital – a philosophy that the NCUA endorsed  
14 and said had served WesCorp well.

15 **The NCUA Gave WesCorp Special Permission to Buy Far Riskier**  
16 **Investments Than WesCorp Ever Bought and Far Riskier Investments**  
17 **Than Those the NCUA Now Attacks**

18 252. Burrell is informed and believes and on that basis alleges that the  
19 NCUA affirmatively chose to give WesCorp the highest level of expanded  
20 investment authority given to any corporate credit union.

21 253. In particular but without limitation, the NCUA gave WesCorp  
22 authority to invest in securities rated by the ratings agencies as low as BBB.  
23 *See* 12 C.F.R. Part 704, Appx. B (Oct. 25, 2002). BBB is six levels below the  
24 lowest rated investment that WesCorp ever made (AA).

**The NCUA Monitored WesCorp's Investments Daily Using On-Site  
Examiners in Additional To Annual Examinations**

254. The NCUA's Office of Corporate Credit Unions ("OCCU") provided supervision and oversight of WesCorp, including its investment strategies and risk assessment.

255. The NCUA's supervision was conducted, among other ways, through an on-site Capital Market Specialist ("CMS") who was physically located at WesCorp's facilities on a full-time basis.

256. In particular and without limitation, the CMS provided real-time surveillance of WesCorp's investment activity.

257. The on-site CMS had a permanent office at WesCorp. The on-site CMS received (among other things) the ALCO and Board books and minutes of ALCO meetings, Board meetings and other key meetings, WesCorp's financial statements, copies of a number of internal management reports and custom reports that the CMS themselves designed. The on-site CMS received these materials at the same time they were circulated internally to management and to WesCorp's board.

258. The on-site CMS had his own drive on WesCorp's computer network where the above materials, and other requested raw data, was placed for his use.

259. In addition to the formal reporting, the on-site CMS spent much of his day walking around and talking directly with a large number of key WesCorp staff about WesCorp's activities, including its investment activities.

260. The on-site CMS also requested permission, which was normally forthcoming, to sit in on certain meetings such as the Board training sessions.

261. The CMS also assisted in annual examinations of WesCorp, although by design the CMS did not directly carry out examination work

1 himself.

2       262. The OCCU examiners' efforts resulted in yearly examination  
3 reports, analyzing and assessing WesCorp's operations, including but not  
4 limited to WesCorp's investment strategies and risk assessment.

5       263. In addition, the NCUA's Office of Capital Markets ("OCM")  
6 provided assistance to NCUA's OCCU examiner by, among other things,  
7 helping to evaluate WesCorp's investments and related asset and liability  
8 issues.

9       264. At the NCUA's request, WesCorp staff also conducted training  
10 sessions on risk management for NCUA natural person credit union examiners  
11 that were organized and run by the OCM.

12       265. WesCorp staff also regularly provided training sessions to  
13 examination staff from other state regulatory bodies including the National  
14 Association of Credit Union Supervisors ("NASCUS") and the Departments  
15 of Financial Institutions in both California and Washington State.

16       266. At the NCUA's request, the OCCU regularly sent other CMS to  
17 WesCorp for training purposes.

18       267. Burrell is informed and believes and on that basis alleges that, as  
19 a result of NCUA's constant oversight and examination efforts, NCUA was at  
20 all times aware of WesCorp's investments, investment philosophy and  
21 monitoring and risk-protection efforts, and the NCUA consistently approved  
22 of WesCorp's investments, investment philosophy and monitoring and risk-  
23 protection efforts.

24

25

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28

**The NCUA Approved of WesCorp's Investment in Option ARM MBS,  
Lower Tranche MBS and Reduced Documentation MBS**

268. Burrell is informed and believes and on that basis alleges that the NCUA, through its oversight and examination efforts, also knew that Option ARM MBS were not a "new" security type that WesCorp began investing in.

269. NCUA regulations and WesCorp policies refer to "new" security types as those securities which have different collateral than other securities.

270. As NCUA was aware at all relevant times, WesCorp had a long history of purchasing securities with the same type of collateral – mortgages – as Option ARM MBS.

271. Burrell is informed and believes and on that basis alleges that NCUA and OCCU examiners ratified WesCorp's investment in Option ARM MBS and never suggested that Option ARM MBS were a "new" security type which WesCorp should review as such.

272. Burrell is informed and believes and on that basis alleges that the NCUA, though its OCCU examiners, consistently approved of WesCorp's investment strategies and investment concentrations, including WesCorp's investments in Option ARM MBS, lower tranche MBS and reduced documentation MBS.

**The NCUA Approved of WesCorp's Investment Related Policies and  
Procedures**

273. Burrell is informed and believes and on that basis alleges that the NCUA approved of WesCorp's investment related and credit risk management policies and procedures including, among other things, the policies and procedures described in paragraphs 274 through 288 below.

274. Burrell is informed and believes and on that basis alleges that the NCUA approved of WesCorp's policies and procedures for limiting

1 investments to primarily high grade securities with AA and AAA ratings.  
2 Indeed, the NCUA praised WesCorp's criteria as stringent and conservative,  
3 with several levels of diversification to mitigate risk, and praised WesCorp's  
4 asset portfolio as high quality.

5 275. Burrell is informed and believes and on that basis alleges that the  
6 NCUA approved of WesCorp's policies and procedures for conducting credit  
7 reviews or proposed security purchases prior to purchasing. Indeed, while  
8 suggesting ways that procedures might be improved, the NCUA said in 2006  
9 that WesCorp's procedures met industry standards, and the next year (2007),  
10 the NCUA described WesCorp's procedures as involving rigorous screening  
11 and diligent monitoring.

12 276. Burrell is informed and believes and on that basis alleges that the  
13 NCUA approved of – and indeed required – that WesCorp separate the credit  
14 risk management function from the interest rate and liquidity risk taking and  
15 investment functions, and make the credit risk management function a stand-  
16 alone unit, independent of the risk taking or investment function. *See* NCUA,  
17 OCCU, *Guidelines for Submission of Requests for Expanded Authority Under*  
18 *the Provisions of Appendix B, Part 704, NCUA Rules and Regulations* (Oct.  
19 17, 2002).

20 277. Accordingly, Burrell had no duty to perform the credit risk  
21 management function.

22 278. Burrell is informed and believes and on that basis alleges that the  
23 NCUA approved of WesCorp's policies and procedures for conducting credit  
24 reviews on newly-issued security types.

25 279. Burrell is informed and believes and on that basis alleges that the  
26 NCUA approved of WesCorp's policies and procedures for conducting annual  
27 credit reviews on existing securities.

28

1           280. Burrell is informed and believes and on that basis alleges that the  
2 NCUA approved of WesCorp's policies and procedures for preparing monthly  
3 watch lists for, and keeping appropriate oversight of, securities that were not  
4 performing well.

5           281. Burrell is informed and believes and on that basis alleges that the  
6 NCUA approved of WesCorp's policies and procedures for creating  
7 concentration limits as to individual issues, individual issuers, individual  
8 underwriters, individual servicers and particular geographic areas, among  
9 other things.

10          282. By way of example, and without limitation, the NCUA suggested  
11 that WesCorp add new concentration limits by servicer, and WesCorp did so.  
12 In contrast, the NCUA never suggested to WesCorp that it create new  
13 concentration limits for Option ARMs, or for specific types of collateral, until  
14 the NCUA wrote a new regulation to that effect, effective only in 2011.  
15 Indeed, the NCUA specifically praised WesCorp for good asset diversification  
16 and in particular praised its derivatives program.

17          283. Burrell is informed and believes and on that basis alleges that the  
18 NCUA approved of WesCorp's policies and procedures for creating  
19 concentration limits as to different security types.

20          284. Burrell is informed and believes and on that basis alleges that the  
21 NCUA approved of WesCorp's policies and procedures for publishing  
22 monthly reports on credit status and providing the WesCorp Board and ALCO  
23 with substantial information regarding concentration limits and credit  
24 enhancement levels on WesCorp's security portfolios.

25          285. Before filing its first amended complaint in this lawsuit, the  
26 NCUA never told Burrell or made any claim that WesCorp's investment  
27 strategies violated NCUA regulations or WesCorp policies.

28



1           286. Burrell is informed and believes and on that basis alleges that the  
2 NCUA at all times approved of WesCorp's investment strategies.

3           287. Burrell is informed and believes and on that basis alleges that the  
4 NCUA generally approved of WesCorp's risk assessment efforts.

5           288. In those instances, to the extent there were any, where the NCUA  
6 raised any concerns regarding WesCorp's risk assessment efforts, WesCorp  
7 promptly addressed those concerns, and the NCUA subsequently approved of  
8 WesCorp's remedial efforts.

9           **The NCUA Knew That the Ratings Agencies Also Praised WesCorp**

10           289. Burrell is informed and believes and on that basis alleges that the  
11 NCUA at all relevant times knew that the ratings agencies (such as Moody's  
12 and Standard & Poor) reviewed WesCorp, including its investment portfolio,  
13 and gave WesCorp high marks for having a high-credit-quality asset portfolio  
14 with low credit risk.

15           **The NCUA Believed and Publicly Stated That AA and AAA Rated**  
16 **Private Label MBS Were Appropriate Investments and Nearly as Safe as**  
17 **Agency MBS**

18           290. As late as July 2010, the NCUA believed and publicly made the  
19 statements set forth in paragraphs 291 through 298 below, among others.

20           291. "Historically mortgage-backed securities experienced no  
21 significant losses . . . ."

22           292. "Historically, mortgage-backed securities fit well into the  
23 corporate credit unions' business function as a liquidity provider because there  
24 was an active market for mortgage-backed securities and they could be used as  
25 collateral for borrowing."

26           293. "When corporate credit unions had excess funds on deposit from  
27 consumer credit unions who were their members, some purchased private-



1 label mortgage-backed securities with those funds. The securities offered a  
2 better return and were historically just as safe as many other investment  
3 products.”

4 294. “When the investment requirements for Part 704 [that is,  
5 12 C.F.R. Part 704, the NCUA’s regulations for corporate credit unions, none  
6 of which WesCorp is alleged to have violated] were implemented, a thorough  
7 review was performed on the history of credit ratings and their success in  
8 evaluating the financial strength of marketable securities. The loss history of  
9 securities with an initial rating of triple-A or double-A was less than one half  
10 of one percent. The loss history of securities issued by government-sponsored  
11 entities and the loss history of private label securities was virtually the same.”

12 295. “While corporate credit unions were not allowed to rely only on  
13 credit ratings, the track record of credit ratings in evaluating the future  
14 performance of securities was historically strong. Credit ratings have been an  
15 investment decision-making tool in financial markets for decades.”

16 296. “All of the mortgage-backed securities that were purchased by  
17 corporate credit unions were permissible at the time they were acquired and  
18 accordingly met the rating requirements.”

19 297. “Based on historic performance, there appeared to be very little  
20 risk with the private label mortgage backed securities purchased by the  
21 corporates.”

22 298. “Finally, many of the securities paid interest based on a floating  
23 rate rather than a fixed rate. This helped corporate credit unions in the overall  
24 management of their investment and share portfolios, and mitigated the risk of  
25 changing interest rates.”

26 299. In light of the foregoing, the NCUA knowingly consented to,  
27 approved, acquiesced in, participated in and/or ratified each and every activity  
28

1 that the NCUA now challenges as improper and complains of in the Second  
2 Amended Complaint.

3 **SECOND AFFIRMATIVE DEFENSE**

4 **(Standing)**

5 300. Burrell incorporates by reference and realleges each and every  
6 allegation contained in paragraphs 247 through 299 as though fully set forth  
7 herein.

8 301. The Second Amended Complaint, and each and every cause of  
9 action alleged therein against Burrell, is barred, in whole or in part, because  
10 NCUA lacks standing to assert the claims alleged in this action.

11 **THIRD AFFIRMATIVE DEFENSE**

12 **(Loyalty, Prudent Person, Candor, Good Faith)**

13 302. Burrell incorporates by reference and realleges each and every  
14 allegation contained in paragraphs 247 through 299 as though fully set forth  
15 herein.

16 303. The Second Amended Complaint, and each cause of action  
17 alleged therein against Burrell, is barred, in whole or in part, because at all  
18 times Burrell acted prudently, honestly, in good faith, with full candor, and in  
19 the best interest of WesCorp.

20 **FOURTH AFFIRMATIVE DEFENSE**

21 **(Business Judgment Rule, Due Diligence, Reasonable Investigation and**  
22 **Business Custom and Usage)**

23 304. Burrell incorporates by reference and realleges each and every  
24 allegation contained in paragraphs 247 through 299 as though fully set forth  
25 herein.

26 305. The Second Amended Complaint, and each cause of action  
27 alleged therein against Burrell, is barred, in whole or in part, because each and  
28

1 every act and omission by Burrell was made after reasonable investigation,  
2 because Burrell had reasonable grounds to believe, and did believe, that such  
3 acts or omissions were prudent given the circumstances, and because every act  
4 and omission of Burrell met or exceeded the custom and practice in the  
5 industry.

6 **FIFTH AFFIRMATIVE DEFENSE**

7 **(Reliance on Others)**

8 306. Burrell incorporates by reference and realleges each and every  
9 allegation contained in paragraphs 247 through 299 as though fully set forth  
10 herein.

11 307. The Second Amended Complaint, and each cause of action  
12 alleged therein against Burrell, is barred, in whole or in part, because every act  
13 or omission by Burrell alleged in the Second Amended Complaint, if it  
14 occurred at all, was made or occurred in reasonable good faith reliance on the  
15 statements and representations of others upon which Burrell was entitled to  
16 rely.

17 **SIXTH AFFIRMATIVE DEFENSE**

18 **(Reliance on Professionals)**

19 308. Burrell incorporates by reference and realleges each and every  
20 allegation contained in paragraphs 247 through 299 as though fully set forth  
21 herein.

22 309. The Second Amended Complaint, and each cause of action  
23 alleged therein against Burrell, is barred, in whole or in part, because Burrell  
24 relied in good faith upon the professional judgments of WesCorp's  
25 professionals, as well as its inside and outside auditors, investment bankers,  
26 ratings agencies, consultants (such as RiskSpan) and counsel at the time of the  
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1 alleged acts concerning matters which he reasonably believed to be within  
2 such persons' professional or expert competence.

3 **SEVENTH AFFIRMATIVE DEFENSE**

4 **(Conduct of Others)**

5 310. Burrell incorporates by reference and realleges each and every  
6 allegation contained in paragraphs 247 through 299 as though fully set forth  
7 herein.

8 311. The Second Amended Complaint, and each cause of action  
9 alleged therein against Burrell, is barred, in whole or in part, to the extent  
10 NCUA purports to hold Burrell responsible for alleged breaches of fiduciary  
11 duties, negligence, or conduct engaged in, by third parties or other defendants,  
12 including but not limited to rating agencies, lenders, issuers and underwriters,  
13 such as the entities that the NCUA has sued in this Court and others and has  
14 accused of making misrepresenting to WesCorp about MBS sold to WesCorp.

15 **EIGHTH AFFIRMATIVE DEFENSE**

16 **(Indemnification, Contribution and Proportionate Liability)**

17 312. Burrell incorporates by reference and realleges each and every  
18 allegation contained in paragraphs 247 through 299 as though fully set forth  
19 herein.

20 313. Without in any way admitting that NCUA has suffered any loss  
21 as alleged in the Second Amended Complaint, to the extent any loss has been  
22 sustained, Burrell is entitled to indemnification and/or contribution from  
23 others, named or unnamed in this action, relating to such alleged losses,  
24 including but not limited to indemnification from co-defendants who caused or  
25 contributed to damages allegedly incurred and from the NCUA pursuant to the  
26 California Labor Code or other applicable laws.

1 **NINTH AFFIRMATIVE DEFENSE**

2 **(Apportionment)**

3 314. Burrell incorporates by reference and realleges each and every  
4 allegation contained in paragraphs 247 through 299 as though fully set forth  
5 herein.

6 315. Without admitting that NCUA suffered damages in any amount,  
7 or that Burrell or any defendant is or should be liable for any such damages,  
8 Burrell asserts that his liability and the liability of any other responsible  
9 persons, named or unnamed, should be apportioned according to their relative  
10 degrees of fault, and any alleged liability of Burrell should be reduced  
11 accordingly.

12 **TENTH AFFIRMATIVE DEFENSE**

13 **(Lack of Injury to Plaintiff)**

14 316. Burrell incorporates by reference and realleges each and every  
15 allegation contained in paragraphs 247 through 299 as though fully set forth  
16 herein.

17 317. The Second Amended Complaint, and each cause of action  
18 alleged therein against Burrell, is barred, in whole or in part, because NCUA  
19 has not suffered any legally cognizable injury or damage.

20 **ELEVENTH AFFIRMATIVE DEFENSE**

21 **(No Causation)**

22 318. Burrell incorporates by reference and realleges each and every  
23 allegation contained in paragraphs 247 through 299 as though fully set forth  
24 herein.

25 319. The Second Amended Complaint, and each cause of action  
26 alleged therein against Burrell, is barred, in whole or in part, because Burrell  
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1 did not directly or indirectly cause the alleged damages complained of in the  
2 Second Amended Complaint.

3 **TWELFTH AFFIRMATIVE DEFENSE**

4 **(Intervening or Superseding Cause)**

5 320. Burrell incorporates by reference and realleges each and every  
6 allegation contained in paragraphs 247 through 299 as though fully set forth  
7 herein.

8 321. The Second Amended Complaint, and each cause of action  
9 alleged therein against Burrell, is barred, in whole or in part, because NCUA's  
10 alleged damages, if any, were the result of one or more intervening or  
11 superseding causes or caused by the acts and/or failures to act of persons  
12 and/or entities other than Burrell, and were not the result of any act or  
13 omission on the part of Burrell.

14 **THIRTEENTH AFFIRMATIVE DEFENSE**

15 **(Macroeconomic Factors)**

16 322. Burrell incorporates by reference and realleges each and every  
17 allegation contained in paragraphs 247 through 299 as though fully set forth  
18 herein.

19 323. The Second Amended Complaint, and each cause of action  
20 alleged therein against Burrell, is barred, in whole or in part, because NCUA's  
21 injuries or damages, to the extent they exist, were caused by supervening  
22 events unconnected to Burrell, including macroeconomic and mortgage  
23 industry events that constrained WesCorp's access to the credit and capital  
24 markets and affected its liquidity.

1 **FOURTEENTH AFFIRMATIVE DEFENSE**

2 **(Laches)**

3 324. Burrell incorporates by reference and realleges each and every  
4 allegation contained in paragraphs 247 through 299 as though fully set forth  
5 herein.

6 325. The Second Amended Complaint, and each cause of action  
7 alleged therein against Burrell, is barred, in whole or in part, by the doctrine of  
8 laches.

9 **FIFTEENTH AFFIRMATIVE DEFENSE**

10 **(Waiver)**

11 326. Burrell incorporates by reference and realleges each and every  
12 allegation contained in paragraphs 247 through 299 as though fully set forth  
13 herein.

14 327. The Second Amended Complaint, and each cause of action  
15 alleged therein against Burrell, is barred, in whole or in part, by the doctrine of  
16 waiver.

17 **SIXTEENTH AFFIRMATIVE DEFENSE**

18 **(Estoppel)**

19 328. Burrell incorporates by reference and realleges each and every  
20 allegation contained in paragraphs 247 through 299 as though fully set forth  
21 herein.

22 329. The Second Amended Complaint, and each cause of action  
23 alleged therein against Burrell, is barred, in whole or in part, by the doctrine of  
24 estoppel because, by its words, actions and failures to act, NCUA is equitably  
25 estopped from asserting each of the purported causes of action alleged in the  
26 Complaint and/or from obtaining any of the relief sought thereby.

1 **SEVENTEENTH AFFIRMATIVE DEFENSE**

2 **(In Pari Delicto, Unclean Hands)**

3 330. Burrell incorporates by reference and realleges each and every  
4 allegation contained in paragraphs 247 through 299 as though fully set forth  
5 herein.

6 331. The Second Amended Complaint, and each cause of action  
7 alleged therein against Burrell, is barred, in whole or in part, by the doctrines  
8 of in pari delicto and/or unclean hands.

9 **EIGHTEENTH AFFIRMATIVE DEFENSE**

10 **(Statute of Limitations)**

11 332. Burrell incorporates by reference and realleges each and every  
12 allegation contained in paragraphs 247 through 299 as though fully set forth  
13 herein.

14 333. The Second Amended Complaint, and each cause of action  
15 alleged therein against Burrell, is barred, in whole or in part, because of the  
16 applicable statute(s) of limitations and/or period(s) of repose.

17 **NINETEENTH AFFIRMATIVE DEFENSE**

18 **(Unjust Enrichment)**

19 334. Burrell incorporates by reference and realleges each and every  
20 allegation contained in paragraphs 247 through 299 as though fully set forth  
21 herein.

22 335. The Second Complaint, and each cause of action alleged therein  
23 against Burrell, is barred, in whole or in part, because NCUA would be  
24 unjustly enriched if it were allowed to recover in this action. Furthermore,  
25 without admitting that NCUA has suffered any loss as a result of an act or  
26 omission alleged in the Second Amended Complaint, any damages awarded in  
27 connection with the claims asserted in this action are offset and/or must be  
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1 reduced by the amount of the tax benefit accruing to NCUA, by virtue of its  
2 deduction of capital loss, in order to prevent unjust enrichment.

3 **TWENTIETH AFFIRMATIVE DEFENSE**

4 **(No Entitlement to Compensatory Damages)**

5 336. Burrell incorporates by reference and realleges each and every  
6 allegation contained in paragraphs 247 through 299 as though fully set forth  
7 herein.

8 337. NCUA is not entitled to recover the compensatory damages  
9 requested in the Second Amended Complaint.

10 **TWENTY-FIRST AFFIRMATIVE DEFENSE**

11 **(No Entitlement to Exemplary or Punitive Damages)**

12 338. Burrell incorporates by reference and realleges each and every  
13 allegation contained in paragraphs 247 through 299 as though fully set forth  
14 herein.

15 339. NCUA is precluded from recovering exemplary or punitive  
16 damages, either in whole or in part, from Burrell under the applicable  
17 provisions of the law, including, without limitation, California Civil Code  
18 section 3294, the United States Constitution and/or the California  
19 Constitution.

20 **TWENTY-SECOND AFFIRMATIVE DEFENSE**

21 **(No Entitlement to Costs of Litigation)**

22 340. Burrell incorporates by reference and realleges each and every  
23 allegation contained in paragraphs 247 through 299 as though fully set forth  
24 herein.

25 341. NCUA is not entitled to recover its costs and expenses incurred in  
26 this action, including, without limitation, attorneys' fees, from Burrell.

1 **COUNTERCLAIMS**

2 342. For counterclaims, Burrell alleges:

3 **JURISDICTION**

4 343. The Court has supplemental jurisdiction over these counterclaims  
5 under 28 U.S.C. § 1367(a), because these counterclaims and the purported  
6 claims alleged by plaintiff all form part of the same case or controversy  
7 concerning the parties' rights and responsibilities related to Defendants'  
8 service as officers and directors of WesCorp.

9 344. The amount in controversy with respect to each of these  
10 counterclaims exceeds the sum or value of \$75,000, exclusive of interest and  
11 costs.

12 **PARTIES**

13 345. Between June 30, 1997 and March 20, 2009, Counterclaimant  
14 Burrell served as Chief Investment Officer of WesCorp. Between January 31,  
15 2003 and March 20, 2009, Burrell served as an Executive Vice President of  
16 WesCorp.

17 346. Counter-defendant National Credit Union Administration Board  
18 as Liquidator of Western Corporate Federal Credit Union ("NCUA") is the  
19 liquidating agent of WesCorp.

20 **FACTUAL ALLEGATIONS**

21 **Policy 21**

22 347. WesCorp's board adopted a resolution regarding indemnification  
23 and insurance, codified in WesCorp's book of policies as "Policy 21."

24 348. WesCorp promised in Policy 21 to indemnify WesCorp's current  
25 and former directors and officers "to the maximum extent permitted by either"  
26 California law or the Model Business Corporation Act ("MBCA") "for any  
27 liability asserted against them in connection with judicial or administrative  
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1 proceedings, formal or informal, to which they are or may become parties by  
2 reason of the performance of their official duties.”

3 349. WesCorp also agreed in Policy 21 that the indemnification “shall  
4 include the recovery of reasonable costs and attorneys’ fees incurred by an  
5 individual so indemnified if such individual is required to engage the services  
6 of any attorney ... to secure the indemnity provided herein.”

7 350. WesCorp also agreed in Policy 21 to “purchase and maintain  
8 insurance” on behalf of current and former officials and employees “against  
9 any liability asserted against them and expenses reasonably incurred by them  
10 in their official capacities and arising out of the performance of their official  
11 duties to the extent such insurance is permitted by the applicable state law or  
12 the Model Business Corporation Act.”

### 13 **The CUMIS Policy**

14 351. WesCorp purchased a “directors and officers” insurance policy  
15 from CUMIS Insurance Society, Inc. (“CUMIS”), Special Insurance Package  
16 No. 065468-22 (the “CUMIS Policy”), effective January 1, 2009.

17 352. On December 11, 2009, Counterclaimants’ then-counsel, Randy  
18 Moore (“Moore”), sent a letter to CUMIS tendering the defense of this suit  
19 under the CUMIS Policy.

20 353. On December 28, 2009, CUMIS sent a letter to Mr. Moore  
21 denying that CUMIS has a “duty to defend” under the CUMIS Policy and  
22 denying coverage for the claim.

23 354. CUMIS agreed that the allegations of the complaint – breach of  
24 duties in the discharge of Counterclaimants’ duties as directors and employees  
25 of WesCorp – were the type of “claims” for “losses” related to a “wrongful  
26 act” that are covered by the terms of the Policy.

27 355. However, CUMIS claimed that it does not have a “duty to  
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1 defend” under the CUMIS Policy, which states that “CUMIS has no duty to  
2 defend . . . or to pay any ‘defense costs’ prior to the final adjudication or  
3 disposition of any ‘claim’ . . . .”

4 356. CUMIS also refused to cover the claim against Burrell on the  
5 ground that the CUMIS Policy contains an “investment exclusion” which  
6 provides that “CUMIS will not be liable to make any payment for ‘loss’ in  
7 connection with or arising out of any ‘claim’ . . . . Based upon or resulting  
8 directly or indirectly from investments . . . [or] investment or trading  
9 losses . . . .”

10 357. CUMIS agreed to pay only an aggregate amount of \$100,000 of  
11 defense costs for all of the insured defendants under the CUMIS Policy  
12 pursuant to an exception to the “investment exclusion” allowing for payment  
13 of such costs subject to a \$500,000 retention or deductible.

#### 14 **NCUA’s Denial of Advancement**

15 358. On December 11, 2009, Moore sent a letter to the NCUA  
16 requesting that the NCUA as conservator or liquidator of WesCorp indemnify  
17 and advance the defense costs of Burrell pursuant to Policy 21.

18 359. On February 2, 2010, the NCUA sent a letter to Moore refusing  
19 to advance defense costs. The NCUA’s letter stated that the NCUA would  
20 determine whether it would provide indemnification “once the matter is  
21 resolved.”

#### 22 **Burrell’s Administrative Request**

23 360. On February 1, 2011, Burrell and the Director Defendants  
24 submitted a request to NCUA as Liquidating Agent for WesCorp for  
25 indemnification of any judgment against them arising from this litigation,  
26 reimbursement of past defense costs incurred in defending this litigation,  
27 advancement of any future defense costs that they might incur, and  
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1 indemnification for any costs they incur in establishing their right to indemnity  
2 (the “Claim”).

3 361. By not responding to the Claim within 180 days, as required by  
4 law, the Liquidating Agent has by operation of law denied the claim, effective  
5 on the 180th day.

### 6 **FIRST COUNTERCLAIM**

#### 7 **(Advancement of Litigation Costs Under Policy 21)**

8 362. Burrell incorporates by reference and realleges each and every  
9 allegation contained in paragraphs 342 through 361 as though fully set forth  
10 herein.

11 363. WesCorp agreed in Policy 21 to indemnify Burrell “to the  
12 maximum extent permitted by either” California law *or* the MBCA.

13 364. The MBCA provides that a corporation must advance defense  
14 costs if the corporation has promised by resolution or otherwise  
15 indemnification “to the fullest extent permitted by law,” as WesCorp did in  
16 Policy 21. MBCA section 8.58 expressly states that any such resolution “shall  
17 be deemed to *obligate* the corporation to *advance* funds to pay for or  
18 reimburse” the defense costs before final disposition of the case (emphasis  
19 added).

20 365. Burrell will provide to the NCUA as Liquidator of WesCorp the  
21 written affirmation and undertaking required for advancement of attorneys’  
22 fees by MBCA § 8.53. Burrell will provide a written affirmation that he in  
23 good faith believes that he has met the relevant standard of conduct in MBCA  
24 § 8.51 required for indemnification: that he conducted himself in good faith  
25 and in what he reasonably believed was in the best interests of WesCorp.  
26 Burrell will also provide a written undertaking to repay any advanced funds if  
27 it is ultimately determined that he is not entitled to mandatory indemnification  
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1 or that he did not meet the standard of conduct under section 8.51.

2 366. The NCUA as liquidator of WesCorp is obligated to advance to  
3 Burrell defense costs incurred in this litigation under the provisions of the  
4 MBCA that are adopted in Policy 21.

5 367. The NCUA has failed to advance Burrell his defense costs  
6 incurred in this action

7 368. Burrell has incurred and will incur damages as a result of the  
8 NCUA's failure to advance his defense costs incurred in this litigation, in an  
9 amount to be determined at trial.

## 10 **SECOND COUNTERCLAIM**

### 11 **(Indemnification under California Labor Code 2802)**

12 369. Burrell incorporates by reference and realleges each and every  
13 allegation contained in paragraphs 342 through 361 as though fully set forth  
14 herein.

15 370. At all relevant times, Burrell was an employee of WesCorp.

16 371. California Labor Code Section 2802 provides that an employer  
17 "*shall* indemnify his or her employee for all necessary expenditures or losses  
18 incurred by the employee in direct consequence of the discharge of his or her  
19 duties[.]"

20 372. NCUA as liquidator of WesCorp is obligated to indemnify and  
21 reimburse Burrell for his defense costs as they are incurred in this litigation  
22 under the California Labor Code Section 2802.

23 373. Burrell has incurred and paid attorneys' fees and costs in defense  
24 of the claims asserted by NCUA as liquidator of WesCorp in this litigation,  
25 and will continue to do so.

26 374. The NCUA has failed to reimburse Burrell for the attorneys' fees  
27 and costs he has incurred to date, and has not agreed to reimburse him for  
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1 defense costs as incurred.

2 375. Burrell has incurred damages as a result of NCUA's failure to  
3 reimburse him for his attorney's fees and costs, and will continue to incur such  
4 damages, in an amount to be determined at trial.

5 **THIRD COUNTERCLAIM**

6 **(Indemnity Under Policy 21)**

7 376. Burrell incorporates by reference and realleges each and every  
8 allegation contained in paragraphs 342 through 361 as though fully set forth  
9 herein.

10 377. WesCorp agreed in Policy 21 to indemnify Burrell "to the  
11 maximum extent permitted by either" California law *or* the MBCA.

12 378. Burrell demands indemnity under Policy 21 to the fullest extent  
13 permissible under either California law or the MBCA and/or defense costs to  
14 the fullest extent permissible under either California law or the MBCA.

15 379. Burrell also demands recovery of costs and attorneys' fees  
16 incurred to secure the indemnity provided for in Policy 21.

17 380. If NCUA refuses to indemnify Burrell pursuant to Policy 21,  
18 Burrell will suffer damages in an amount to be determined at trial.

19 **FOURTH COUNTERCLAIM**

20 **(Declaratory Relief)**

21 381. Burrell incorporates by reference and realleges each and every  
22 allegation contained in paragraphs 342 through 361 as though fully set forth  
23 herein.

24 382. The NCUA is obligated to advance to Burrell his attorneys' fees  
25 and costs incurred in defense of this litigation under Policy 21, the MBCA,  
26 and California Labor Code Section 2802.

27 383. The NCUA has failed to respond to Burrell's request for  
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1 advancement of his attorney's fees and costs incurred in defense of this  
2 litigation.

3 384. Accordingly, a justiciable controversy exists between the parties,  
4 and the rights of the parties with respect to the advancement of attorneys' fees  
5 and costs incurred in defense of this litigation can be determined only by  
6 declaratory relief.

## 7 **FIFTH COUNTERCLAIM**

### 8 (Declaratory Relief)

9 385. Burrell incorporates by reference and realleges each and every  
10 allegation contained in paragraphs 342 through 361 as though fully set forth  
11 herein.

12 386. WesCorp promised in Policy 21 to "purchase and maintain"  
13 insurance "against any liability asserted against" Burrell.

14 387. The CUMIS Policy that WesCorp purchased was inadequate to  
15 fulfill this promise.

16 388. WesCorp purchased an insurance policy from CUMIS Insurance  
17 Society, which has taken the position that the claims asserted against Burrell  
18 in this action are excluded from coverage under the insurance policy.

19 389. Because the CUMIS Policy does not cover Burrell for "any  
20 liability" related to an investment claim, WesCorp breached the promise to  
21 provide insurance coverage for Burrell in Policy 21.

22 390. Because CUMIS invoked exclusions to deny most coverage to  
23 Burrell, but for WesCorp's failure to comply with its obligations and obtain  
24 adequate insurance coverage, Burrell would have been covered for all of the  
25 costs and claims related to this litigation.

26 391. An actual existing and bona fide controversy exists between  
27 Burrell, on the one hand, and the NCUA, on the other hand, as to the NCUA's  
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1 liability for advancement and indemnification, in that:

2 392. Policy 21 promises to maintain insurance coverage for “any  
3 liability” asserted against Burrell, yet CUMIS has taken the position that the  
4 CUMIS Policy does not cover the current action.

5 393. NCUA has declined to pay for Burrell’s defense costs.

6 394. The rights of the parties under Policy 21 can be determined only  
7 by declaratory relief.

8 **PRAYER**

9 WHEREFORE, Burrell prays for judgment against plaintiffs as follows:

10 1. That plaintiff takes nothing by the Complaint and that the  
11 Complaint be dismissed with prejudice.

12 2. That judgment be entered in favor of Burrell and against plaintiff.

13 3. That Burrell be awarded damages on his counterclaims, in  
14 amounts to be determined at trial.

15 4. That the Court adjudge and declare that NCUA is obligated to  
16 pay to the fullest extent any liability incurred by Burrell because of the  
17 inadequate insurance policy purchased by WesCorp in breach of its promise to  
18 purchase and maintain insurance under Policy 21.

19 5. That the Court provide injunctive relief requiring the NCUA to  
20 advance Burrell’s defense costs and to indemnify him against those defense  
21 costs and against any liability incurred by Burrell.

22 6. That Burrell be awarded his costs and reasonable attorneys’ fees.

23 7. That Burrell be granted such other and further relief as the Court  
24 may deem just and proper.

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1 Dated: August 15, 2011.

2 PILLSBURY WINTHROP SHAW  
3 PITTMAN LLP  
4 REYNOLD L. SIEMENS #177956  
5 Email: [reynold.siemens@pillsburylaw.com](mailto:reynold.siemens@pillsburylaw.com)  
6 725 South Figueroa Street, Suite 2800  
7 Los Angeles, CA 90017-5406

8 PILLSBURY WINTHROP SHAW  
9 PITTMAN LLP  
10 BRUCE A. ERICSON #76342  
11 Email: [bruce.ericson@pillsburylaw.com](mailto:bruce.ericson@pillsburylaw.com)  
12 MARLEY DEGNER #251923  
13 Email: [marley.degner@pillsburylaw.com](mailto:marley.degner@pillsburylaw.com)  
14 50 Fremont Street, Post Office Box 7880  
15 San Francisco, CA 94120-7880

16 By /s/ Bruce A. Ericson  
17 Bruce A. Ericson

18 Attorneys for Defendant  
19 ROBERT JOHN BURRELL  
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**JURY DEMAND**

Pursuant to Rule 38 of the Federal Rules of Civil Procedure, defendant and counterclaimant ROBERT JOHN BURRELL hereby demands trial by jury on all the issues so triable.

Dated: August 15, 2011.

PILLSBURY WINTHROP SHAW  
PITTMAN LLP  
REYNOLD L. SIEMENS #177956  
Email: [reynold.siemens@pillsburylaw.com](mailto:reynold.siemens@pillsburylaw.com)  
725 South Figueroa Street, Suite 2800  
Los Angeles, CA 90017-5406

PILLSBURY WINTHROP SHAW  
PITTMAN LLP  
BRUCE A. ERICSON #76342  
Email: [bruce.ericson@pillsburylaw.com](mailto:bruce.ericson@pillsburylaw.com)  
MARLEY DEGNER #251923  
Email: [marley.degner@pillsburylaw.com](mailto:marley.degner@pillsburylaw.com)  
50 Fremont Street, Post Office Box 7880  
San Francisco, CA 94120-7880

By /s/ Bruce A. Ericson  
Bruce A. Ericson

Attorneys for Defendant  
ROBERT JOHN BURRELL